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v.
Marcus S. Smith, et al.

Docketed:
April 20, 1990

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Oleniewski,Walter A.

Entry	Date	Note	Proceedings and Orders
1	Apr 20 1990	G	Petition for writ of certiorari filed.
2	May 17 1990		Brief of respondents Marcus S. Smith, et al. in opposition filed.
3	May 22 1990		DISTRIBUTED. June 7, 1990
4	May 30 1990	X	Reply brief of petitioner United States, et al. filed.
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			**********
7	Jul 2 1990	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
6	Jul 26 1990		Brief of petitioners United States, et al. filed.
9	Aug 29 1990		Brief of respondents Marcus S. Smith, et al. filed.
8	Aug 30 1990		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
10	Sep 4 1990		CIRCULATED.
11	Sep 20 1990		Record filed.
		*	Certified copy of original record received.
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15	Nov 7 1990		ARGUED.

89-1646

No.

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MARCUS S. SMITH, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Federal Employees Liability Reform and Tort Compensation Act of 1988—which provides that the exclusive remedy for torts committed by federal employees acting within the scope of their employment is a suit against the United States under the Federal Tort Claims Act—is inapplicable when an exception to the Federal Tort Claims Act forecloses an award of damages against the United States.

PARTIES TO THE PROCEEDING

The petitioners are Dr. William Marshall, Jr., an Army physician, the original defendant below, and the United States of America, which was substituted as defendant by order of the district court.

The respondents, plaintiffs below, are Marcus S. Smith, Hildegard U. Smith, and Dominique Smith.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No.

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MARCUS S. SMITH, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America and William Marshall, Jr., M.D., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 885 F.2d 650. The oral opinion and order of the district court (App., *infra*, 15a-18a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1989. A petition for rehearing was denied on January 25, 1990 (App., *infra*, 19a). The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563-4567, and of the Gonzalez Act, 10 U.S.C. 1089, are set forth in an appendix (App., *infra*, 20a-31a).

STATEMENT

1. In *Westfall* v. *Erwin*, 484 U.S. 292 (1988), this Court held that federal employees are immune from liability for common law torts committed within the scope of their employment only if the relevant acts or omissions are discretionary in nature. The Court added, however, that Congress was "in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context" and that "[l]egislated standards governing the immunity of federal employees involved in state-law tort actions would be useful." *Id.* at 300. In response, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Reform Act), Pub. L. No. 100-694, 102 Stat. 4563-4567. The Act's declared purpose is "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." Section 2(b), 102 Stat. 4564.

To that end, the Reform Act makes the Federal Tort Claims Act the exclusive remedy for state-law torts committed by federal employees acting within the scope of their employment. Section 5 of the Reform Act provides (28 U.S.C. 2679(b)(1)):

> The remedy against the United States provided by [the FTCA, 28 U.S.C. 1346(b), 2672] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

The Act is triggered by a certification that a federal employee named as a defendant in a civil action "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d). The Attorney General (or his designate) is authorized to issue such certifications. 28 U.S.C. 2679(d)(1)-(2). If the Attorney General declines to certify that an employee was acting within the scope of his or her employment, the employee may petition the court in which the suit is pending for such a certification. 28 U.S.C. 2679(d)(3). When the Attorney General or a court has made such a certification, the suit is deemed an action against the United States; the United States is substituted for the employee as the defendant; and, if the suit is pending in state court, it is removed to federal district court. 28 U.S.C. 2679(d)(1)-(3).

The Reform Act makes clear that once the United States has been substituted as the defendant, it may invoke all defenses that would have been available to it if the suit had initially been brought against it under the Federal Tort Claims Act. Upon certification that an employee was acting within the scope of his or her employment, an action initiated against the employee "proceed[s] in the same manner as any action against the United States filed pursuant to section 1346(b) of [Title 28] and [is] subject to the limitations and exceptions applicable to those actions." 28 U.S.C. 2679(d)(4). Similarly, in addition to authorizing the government to assert judicial or legislative immunity if it would have been available to the employee originally named as the defendant, Section 4 of the Reform Act recognizes the government's right to "any other defenses to which the United States is entitled." 28 U.S.C. 2674.

2. This case is a medical malpractice action arising out of services performed by petitioner William Marshall, Jr., M.D., in his capacity as a military physician. At the time of the events giving rise to this action, respondent Marcus Smith was a United States Army Sergeant stationed in Italy. In 1982, his wife, respondent Hildegard Smith, was admitted to the United States Army hospital in Vicenza, Italy, where she gave birth to the Smiths' son, Dominique. Dr. Marshall participated in the delivery. Respondents' complaint alleges that, while acting within the scope of his duties as a military physician, Dr. Marshall was negligent and that this negligence resulted in severe injury to Dominique.

Respondents commenced this action in 1987 in the United States District Court for the Central District of California. The complaint named Dr. Marshall as the sole defendant and based federal jurisdiction on

diversity of citizenship. Invoking the Gonzalez Act, 10 U.S.C. 1089 (App., *infra*, 28a-31a), a statute predating the Reform Act that regulates the remedies available for malpractice by military physicians, the United States moved for an order substituting it for Dr. Marshall as the defendant and dismissing the action under 28 U.S.C. 2680(k). That FTCA exception bars suit against the United States on "[a]ny claim arising in a foreign country." The district court granted the motion. App., *infra*, 15a-18a.

3. While the case was pending in the court of appeals, Congress enacted the Reform Act. Section 8(b) made the Act's provisions applicable to "all claims, civil actions, and proceedings pending on * * * the date of [its] enactment." App., *infra*, 25a. Accordingly, in a supplemental brief filed with the court of appeals, the United States argued that the Reform Act required substitution of the United States for Dr. Marshall as the defendant and dismissal under 28 U.S.C. 2680(k)—the same disposition as the district court had ordered upon the authority of the Gonzalez Act.[1] In the same filing, based upon a review of the Gonzalez Act prompted by the Eleventh

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[1] Under the provisions of Section 6 of the Reform Act, 28 U.S.C. 2679(d)(1), substitution of the United States is normally based on an administrative certification that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." In the present case—in which the district court had ordered substitution pursuant to the Gonzalez Act prior to enactment of the Reform Act—the Department of Justice inadvertently neglected to issue a formal certification under Section 2679 during the pendency of the case in the courts below. A certification has recently been issued. It has never been disputed in this case that Dr. Marshall's actions were within the scope of his employment as an Army physician.

Circuit's decision in *Newman* v. *Soballe*, 871 F.2d 969 (1989), the government withdrew its reliance upon that statute.[2]

The court of appeals reversed, holding that neither the Gonzalez Act nor the Reform Act mandated the substitution of the United States for Dr. Marshall as the defendant in the action. App., *infra*, 1a-14a.

a. With respect to the Gonzalez Act, the court observed that, "[r]ead alone, section 1089(a) does not reveal whether its provisions apply to cases in which sections 1346(b) and 2672 of the FTCA do not provide an alternative remedy." App., *infra*, 4a. However, the panel continued, the "plain meaning" of Section 1089(f)—which authorizes indemnification of military physicians under specified situations (among them, the situation in which the doctor "is assigned to a foreign country")—is that "physicians will continue to be personally liable in the * * * situations specified." App., *infra*, 5a. The court found additional support for this conclusion in cases from other courts and in the legislative history of the Gonzalez Act. *Id.* at 6a-9a. We do not seek further review of this ruling.

[2] In *Newman*, a case decided after the entry of the district court's judgment in this case, the Eleventh Circuit held that the Gonzalez Act did not require substitution of the United States for a military physician sued for negligence committed abroad. The court relied principally on 10 U.S.C. 1089(f), which authorizes indemnification of military doctors held liable for malpractice committed abroad; in the court's view, this provision reflected an intention on the part of Congress to permit lawsuits against individual doctors when an FTCA exception foreclosed suit against the United States. See 871 F.2d at 971-977. Although there was a conflict among the courts of appeals on this question, compare *Jackson* v. *Kelly*, 557 F.2d 735, 740-741 (10th Cir. 1977); *Pelphrey* v. *United States*, 674 F.2d 243, 246 (4th Cir. 1982) (Gonzalez Act or equivalent statute does not require substitution of United States where FTCA exception is applicable), with *Powers* v. *Schultz*, 821 F.2d 295 (5th Cir. 1987) (Gonzalez Act requires substitution and dismissal when suit against the United States is foreclosed), the government determined that it would not continue to invoke the Gonzalez Act in cases of this kind, and would thereafter rely solely on the Reform Act.

Dr. Marshall filed a request *pro se* that the court of appeals nevertheless consider the Gonzalez Act issue. See Request of William Marshall, Jr., In Propria Persona, Sept. 11, 1989.

b. The court of appeals also held that the Reform Act is "inapplicable to this case." App., *infra*, 10a. The court noted that Section 5 of the Reform Act, 28 U.S.C. 2675(b)(1), provides that "[t]he remedy against the United States" conferred by the FTCA "is exclusive of any other civil action or proceeding for money damages . . . against the employee whose act or omission gave rise to the claim" and that Section 2680(k) would preclude an action against the United States on petitioners' claim. App., *infra*, 10a-11a. Under these circumstances, the court reasoned, petitioners "have no remedy against the United States" under the FTCA and, consequently, the Reform Act "does not operate to provide Dr. Marshall with immunity." *Id.* at 11a.

The court found further support for this conclusion in the provisions of the Act dealing with employees of the Tennessee Valley Authority. In the court's view, those provisions extended to TVA employees immunity that had been withheld from government employees involved in tort claims arising in foreign countries. App., *infra*, 11a-12a.

The court described the Reform Act's legislative history as "somewhat contradictory." App., *infra*, 12a. On the one hand, the court understood the Act's declared purpose and statements from the House Report and individual members of Congress to suggest

that the Reform Act was not intended to withdraw any rights that an injured plaintiff might previously have had to pursue relief from an individual federal employee. *Ibid.* On the other hand, the court referred to a passage in the House Report stating that "suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery" and that "any claim against the government that is precluded by the exceptions set forth in [28 U.S.C. 2680] is precluded against an employee [or] his or her estate." *Id.* at 12a-13a (quoting H.R. Rep. No. 700, 100th Cong., 2d Sess. 6-7 (1988)). Dismissing the report as "internally inconsistent" (App., *infra*, 13a), the court adhered to its construction of the statutory language (*ibid.*).

4. The court denied a petition for rehearing and suggestion of rehearing *en banc* addressed to the Reform Act's application to this case. App., *infra*, 19a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that the Reform Act does not apply—and thus exposes federal employees to suit in their individual capacity—whenever an exception to the Federal Tort Claims Act would preclude an award of damages against the United States. This ruling cannot be reconciled with the text of the Reform Act, its stated purpose, or legislative history addressing the precise point at issue. It also conflicts squarely with decisions of several other courts of appeals.

The question on which the Ninth Circuit has parted from other circuits is of great importance to the federal government. The Reform Act was passed because Congress found that the threat of individual liability resulting from this Court's decision in *Westfall* v. *Erwin*, *supra*, was impeding the ability of the

government to perform its responsibilities. The Ninth Circuit's interpretation of the Reform Act would renew that threat not only with respect to acts of federal employees in foreign countries, but also as to a wide variety of other potential claims, including those arising from such torts as defamation, misrepresentation, and interference with contractual relations, from the handling of mail, and from customs and tax matters. There are more than a half million civilian federal employees in the Ninth Circuit who are immediately exposed to liability by the court of appeals' decision. That decision is also likely to undercut the smooth and certain operation of the Reform Act in those circuits that have not yet passed on its applicability in this context.

1. a. The Ninth Circuit limited its analysis of the language of the Reform Act to the first sentence of Section 5 of the statute, 28 U.S.C. 2679(b)(1). That sentence states that "[t]he remedy against the United States" provided by the Federal Tort Claims Act for personal injury or property damage arising from "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee * * * or against the estate of such employee." App., *infra*, 22a. In the court's view, this provision applies only when the FTCA provides a "remedy" against the United States that is not precluded by an exception to the FTCA. *Id.* at 11a. This reading of the text is strained on its own terms, but in any event is foreclosed by other provisions of the Act.[3]

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[3] See *United States* v. *Morton*, 467 U.S. 822, 828 (1984) ("We do not * * * construe statutory phrases in isolation; we read statutes as a whole.").

The very next sentence in Section 5 of the Reform Act directly contradicts the Ninth Circuit's construction. It provides that "[a]ny other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred." Thus, the first sentence cannot be read to preserve the possibility of an action against the individual employee when suit against the United States is barred; such an action, which necessarily arises out of the "same subject matter" as an action against the United States, "is precluded." Read as a whole, Section 5 of the Act permits only one interpretation. A person injured by a federal employee acting within the scope of his or her employment has only one recourse: the "remedy" provided by the Federal Tort Claims Act in an action against the United States—whatever the extent of that remedy may be.

Two other provisions of the Act confirm this interpretation. Under Section 6, whenever the Attorney General or a court has certified that a federal employee who has been named as defendant in a suit was acting within the scope of his or her office or employment, "any [such] action or proceeding * * * shall proceed in the same manner as any action against the United States filed pursuant to [28 U.S.C. 1346(b)] and shall be subject to the limitations and exceptions applicable to those actions." 28 U.S.C. 2679(d)(4). The "limitations and exceptions" applicable to FTCA actions, of course, must include the exceptions enumerated in 28 U.S.C. 2680. As Section 4 of the Reform Act, 28 U.S.C. 2674, confirms, "[w]ith respect to any claim under [28 U.S.C. 2671-2680]," including those in which the United States has been substituted pursuant to a certification that an employee was within the scope of his employment, the United States may assert—in addition to any judicial and legislative immunity available to the employee involved—"any other defenses to which the United States is entitled."[4]

As both the Fifth and Tenth Circuits have concluded, the Reform Act's text compels the conclusion that—subject to the exceptions stated in Section 5 of the Act, 28 U.S.C. 2679(b)(2)—the statute applies to *all* tort suits against federal employees who have acted within the scope of their employment, whether or not a claim falls within an exception to the FTCA. *Mitchell* v. *Carlson*, 896 F.2d 128, 134-

[4] The court of appeals suggested that Section 9 of the Reform Act, 102 Stat. 4566, which deals with suits against TVA employees, supports its interpretation of the statute. However, it is clear that Section 9 merely provides protection for employees of the TVA parallel to that conferred on employees of the United States. Under that Section, an action against the TVA is the exclusive remedy for injuries allegedly inflicted by TVA employees acting within the scope of their employment; the TVA is responsible for issuing certifications on the scope of employment question; the TVA is substituted as the defendant; the action proceeds subject to limitations and exceptions applicable to suits against the TVA; and the TVA may assert any defenses to which it is entitled. Because Section 9 tracks the provisions of the Reform Act applicable to the United States (except that it provides for an exclusive remedy against the TVA, rather than the United States), it does not limit, expressly or by implication, the scope of those more general provisions. As the sponsor of the amendment adding Section 9 to the Reform Act explained, it "merely provides that the same protections enjoyed by Federal employees should be enjoyed by TVA employees." 134 Cong. Rec. S15,559 (daily ed. Oct. 12, 1988) (remarks of Sen. Heflin). The Fifth Circuit has rejected the inference that the Ninth Circuit drew from Section 9. *Mitchell* v. *Carlson*, 896 F.2d 128, 135 n.7 (5th Cir. 1990).

135 (5th Cir. 1990); *Aviles* v. *Lutz*, 887 F.2d 1046, 1049 (10 Cir. 1989). See p. 15, *infra*. The Reform Act makes a suit under the FTCA the exclusive remedy for injuries resulting from the actions of federal employees; precludes any other suit arising from the same subject matter; provides that the suit against the United States shall be subject to the limitations and exceptions of the FTCA; and preserves any defenses available to the United States in such actions. These provisions, most of which were not addressed in the court of appeals' opinion, foreclose that court's construction.

b. The Reform Act's legislative history, and legislative findings enacted as part of the Act, also speak to the precise point in question. The House Report states (H.R. Rep. No. 700, *supra*, at 6-7 (emphasis added)):[5]

> The "exclusive remedy" provision of Section 5 is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment. *Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery. Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee in* [*sic*] *his or her estate.* See *Edelman* v. *Federal Housing Administration*, 382 F.2d 594 (2d Cir. 1967); *Safeway Portland*

[5] This House Report was the only committee report accompanying the Reform Act. The Act was discussed only briefly on the floor of each House. See 134 Cong. Rec. H4718-H4719 (daily ed. June 27, 1988); *id.* at H4804 (daily ed. June 28, 1988); *id.* at S15,597-S15,600 (daily ed. Oct. 12, 1988); *id.* at H10,677-H10,678 (daily ed. Oct. 20, 1988).

> *E.F.C.U.* v. *Federal Deposit Insurance Corporation*, 506 F.2d 1213 (9th Cir. 1974); *Vantrease* v. *United States*, 400 F.2d 853 (6th Cir. 1968); *Powers* v. *Schultz*, 821 F.2d 295 (5th Cir. 1987).

Each of the cited cases held that a statute making an action against the United States the exclusive remedy for tort claims arising from the actions of specified individuals or agencies applied even when an exception to the Federal Tort Claims Act foreclosed any relief. The most authoritative legislative history unequivocally confirms the Reform Act's plain meaning.

This interpretation of the statute—that federal employees acting within the scope of their employment have complete immunity from state-law tort claims, including those to which the United States has a defense—is also consistent with the basic concerns underlying the enactment of the Reform Act. As we have noted, the Act was a response to this Court's decision in *Westfall* v. *Erwin*, *supra*. In findings enacted as part of the statute (App., *infra*, 20a), Congress declared that for many years prior to that decision, "Federal employees [had] been protected from personal common law tort liability by a broad based immunity" and thus "the Federal Tort Claims Act [had] served as the sole means for compensating persons injured by the tortious conduct of Federal employees." Congress understood the *Westfall* decision, however, to have "seriously eroded the common law tort immunity previously available to Federal employees." *Ibid.*

Noting the detrimental consequences for the government of personal exposure to tort liability, as well as this Court's suggestion that legislation would be "useful" (App., *infra*, 20a), Congress undertook to

"remove the potential personal liability of Federal employees for common law torts committed within the scope of their employment" (H.R. Rep. No. 700, *supra*, at 4; see *id.* at 2). The Act's stated purpose was "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." App., *infra*, 21a. Under the Ninth Circuit's interpretation, the Act would fall short of this clearly expressed purpose.[6]

[6] None of the excerpts that the court of appeals quoted from the Act's legislative history supports that court's interpretation. For example, although the Act makes clear that its purpose includes providing persons injured by federal employees with "an appropriate remedy against the United States," the remainder of the Act and its legislative history establish that Congress considered the FTCA, subject to its exceptions and limitations, to constitute an "appropriate" (and fully sufficient) remedy. In its legislated findings, Congress determined that for many years "the Federal Tort Claims Act [had] served as the sole means for compensating persons injured by the tortious conduct of Federal employees" and that *Westfall* v. *Erwin*, *supra*, would "diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts." App., *infra*, 20a, 21a. Similarly, the Ninth Circuit erred in relying on a statement in the House report that "no one who previously had the right to initiate a lawsuit will lose that right," H.R. Rep. No. 700, *supra*, at 7. That statement appears in a discussion of the effective date provisions of the Act; read in its context, it refers to provisions preserving claims that might otherwise have been jeopardized by the immediate applicability of such FTCA procedural requirements as the filing of an administrative claim. In *Mitchell* v. *Carlson*, 896 F.2d at 136, the Fifth Circuit reviewed the materials cited by the Ninth Circuit in this case and observed that "[i]solated language found scattered throughout the legislative history is insufficient persuasion

2. The Ninth Circuit's holding is in square conflict with decisions from other circuits. In *Aviles* v. *Lutz*, *supra*, the Tenth Circuit held that the Reform Act required the substitution of the United States for employees who had been sued for defamation and interference with contractual rights—even though suit against the United States was barred by an FTCA exception for such claims, 28 U.S.C. 2680(h). The court explained that the continued pursuit of the action against the individual defendants was "foreclosed by the plain language of [28 U.S.C. 2679] and its legislative history." 887 F.2d at 1049.

Similarly, in *Mitchell* v. *Carlson*, *supra*, the Fifth Circuit held that an action alleging assault and battery could not be pursued against an individual employee, even though suit against the United States was barred by 28 U.S.C. 2680(h). The court stated (896 F.2d at 134):

> [T]he mandate in § 5 of the [Reform Act] is clear. An action against a federal employee who has been certified as acting in the scope of her employment must proceed *exclusively* against the United States under the FTCA * * *. We must accept the clear mandate of the law. Since there is no remedy for assault and battery in the FTCA, Congress intended to leave a plaintiff such as Mitchell without a remedy for injuries sustained as a result of a federal employee's alleged assault and battery while in the course of employment.

In reaching this conclusion, the Fifth Circuit cited *Aviles* v. *Lutz*, *supra*, with approval. It also noted

that Congress intended to frustrate the very purpose of the [Reform Act], to protect its employees from the distraction and burden of litigation based upon their employment activities."

that its decision was in conflict with the Ninth Circuit's decision in this case; after reviewing the Ninth Circuit's reasoning, the *Mitchell* court "decline[d] to follow the Ninth Circuit case." 896 F.2d at 136.[7]

Two other decisions, from the Fifth and Eleventh Circuits, have applied the Reform Act to cases brought by employees against co-employees; in those cases, the remedy against the government is limited to benefits under the Federal Employees Compensation Act, 5 U.S.C. 8101 *et seq.* See *Sowell* v. *American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989); *Lunsford* v. *Price*, 885 F.2d 236, 237-239 (5th Cir. 1989) (suit against TVA employees). These decisions, which held that injured claimants who had no remedy in tort against the government were also barred from suing individual employees, are inconsistent with the reasoning of the court of appeals in this case.

Finally, in an analogous case, *Springer* v. *Bryant*, No. 89-7272 (Apr. 2, 1990), the Eleventh Circuit held that Section 9 of the Reform Act required dismissal of a wrongful death action commenced against TVA employees. Even though under Alabama law such an action is deemed punitive in character, and thus foreclosed by the TVA's sovereign immunity from punitive damages, the court held that suit could not be pursued against the employees. It observed

[7] Two other courts of appeals have applied the Reform Act to cases in which FTCA exceptions bar suit against the United States, albeit without discussing the question whether the Act mandates that result. See *Jordan* v. *Hudson*, 879 F.2d 98 (4th Cir. 1989) (discretionary function exception of 28 U.S.C. 2680(a)); *Moreno* v. *Small Business Administration*, 877 F.2d 715 (8th Cir. 1989) (claims of defamation and interference with contract, both of which are within the exception of 28 U.S.C. 2680(h)).

that the purpose of the Reform Act was "to create absolute immunity for federal employees who, within the scope of their employment, commit common law torts." [8]

[8] District courts in two other circuits have also reached results consistent with our position. See *McDonald* v. *Hassard*, 89-2 U.S. Tax Cas. (CCH) ¶ 9561 (D. Me. July 13, 1989) (ordering substitution despite applicability of tax and customs exception of 28 U.S.C. 2680(c)); *Gogek* v. *Brown University*, 729 F. Supp. 926 (D.R.I. 1990) (same; contract interference claim barred by 28 U.S.C. 2680(h)); *Verma* v. *United States*, No. 87-2294 (D.D.C. July 24, 1989) (same; recovery barred by *Feres* doctrine).

Other district courts have, like the Ninth Circuit, refused to apply the Reform Act where the result would be dismissal of the suit. *Nasuti* v. *United States*, No. 89-774-N (D. Mass. July 25, 1989), appeal pending, No. 89-1830 (1st Cir.); *Dagnan* v. *Gouger*, No. CIV-1-88-452 (E.D. Tenn. July 18, 1989). The *Dagnan* opinion was subsequently vacated pursuant to a settlement.

In *Newman* v. *Soballe*, 871 F.2d 969 (1989), the Eleventh Circuit held that neither the Reform Act nor the Gonzalez Act required the substitution of the United States for a military physician sued for alleged malpractice abroad. There is language in the opinion that is consistent with the Ninth Circuit's interpretation of the Reform Act in this case; the Eleventh Circuit stated that the Reform Act "only applies in situations where the FTCA itself would apply" and that the FTCA does not apply to cases subject to an FTCA exception such as the foreign-tort exception, 28 U.S.C. 2680(k). 871 F.2d at 971. However, particularly in light of the Eleventh Circuit's subsequent decisions in *Springer* v. *Bryant*, *supra*, and *Sowell* v. *American Cyanamid*, *supra*, the *Newman* decision is now most fairly read to turn on a narrower, alternative ground—that employees covered by the Gonzalez Act are not affected by the Reform Act. See 871 F.2d at 971.

We address the potential applicability of that ground to this case below. See pp. 20-22, *infra*.

3. The certain and uniform application of the Reform Act is of great importance to the federal government. Congress enacted that legislation less than a year after this Court's decision in *Westfall* v. *Erwin*, *supra*, having found that the absence of complete immunity for federal employees had "created an immediate crisis involving the prospect of personal liability" and that this prospect would "seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts." Pet. App. 21a.

The Ninth Circuit's holding severely undercuts the efficacy of the solution that Congress devised for this crisis. There are a number of exceptions to FTCA liability. For example, 28 U.S.C. 2680(b) and (c) preclude the imposition of liability on the United States for claims arising out of the miscarriage of mail, the collection of taxes, and the detention of goods in custody. Under the court of appeals' analysis, individual postal or customs workers will be exposed to the threat of suits in their individual capacity for such matters, based on simple negligence. Similarly, federal employees would be subject to personal suit on claims of the types enumerated in 28 U.S.C. 2680(h), such as misrepresentation, defamation, or interference with contract rights.

Exposing employees to suits of this type will do much to restore the threat that the Reform Act was designed to remove. Given the advantages to the ordinary plaintiff of bringing suit against the government, it is fair to assume that most individuals who sue federal employees do so because there is a legal obstacle to an action against the United States.

The Ninth Circuit's refusal to apply the Reform Act to suits of that type thus would deprive federal employees of protection where it is most needed. And, as Congress noted when it enacted the Reform Act, the threat of these suits falls most heavily on " 'rank and file' workers" who cannot establish that their acts were discretionary within the meaning of *Westfall* v. *Erwin*, *supra*. H.R. Rep. No. 700, *supra*, at 3.

Unless further review is granted, the immediate effects of the court of appeals' ruling are likely to be severe. Over half a million civilian federal workers are employed in the states comprising the Ninth Circuit.[9] Those employees now face the prospect of personal liability in circumstances where their counterparts in other states would enjoy the protection of the Reform Act. Moreover, in those circuits that have not passed upon the applicability of the Reform Act, the decision in this case seems likely to inspire filings against individual employees and to interfere with the Reform Act's effective operation. The Reform Act's procedures are designed to assure that if individual employees are sued, the question whether they have acted within the scope of their employment will be quickly and surely resolved and the United States will be substituted at the outset of the litigation. The conflict created by the Ninth Circuit's decision will interfere with the smooth and certain application of those provisions.

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[9] See United States Office of Personnel Management, *Federal Civilian Workforce Statistics: Biennial Report of Employment by Geographic Areas* 21 (Dec. 31, 1988). This figure does not include military personnel stationed in those states, who would also be affected by the court of appeals' ruling.

Finally, this is an issue on which nationwide uniformity is particularly important. There is no reason why a federal employee's exposure to personal liability should turn on the place of employment.

4. Because the Ninth Circuit held that the Reform Act does not apply to cases in which the foreign tort exception bars a suit against the United States, it did not reach the question whether the Act applies to military physicians who are also subject to the provisions of the Gonzalez Act. In *Newman* v. *Soballe*, *supra*, the Eleventh Circuit concluded that the Reform Act does not apply in that context; it explained that "[a]s a military physician, Dr. Soballe is specifically protected by the Gonzalez Act and is therefore not among those federal employees affected by the *Westfall* decision or the [Reform Act]." 871 F.2d at 971. This potential alternative basis for affirming the court of appeals judgment does not affect the suitability of this case for further review.

First, the court of appeals did not dispose of the case on that basis. It did not hold that the Reform Act was superseded by the Gonzalez Act; rather, it construed the Reform Act to be inapplicable on its own terms. For the reasons set forth above, that interpretation of the Reform Act warrants this Court's attention on its own merits.

Second, the Reform Act should not be construed to draw a distinction between military medical personnel (and others to whom statutes similar to the Gonzalez Act apply) and other federal employees.[10]

[10] In addition to the Gonzalez Act, which covers military medical personnel, there are comparable statutes covering medical personnel of the State Department, 22 U.S.C. 2702, the Veterans Administration, 38 U.S.C. 4116, NASA, 42 U.S.C. 2458a, and the Public Health Service, 42 U.S.C. 233. An analogous statute protects legal personnel of the Department of Defense from legal malpractice liability. 10 U.S.C. 1054.

By its terms, Section 5 of Reform Act, 28 U.S.C. 2679(b)(1), extends to "any employee of the Government," a group that unquestionably includes military physicians. The legislative history suggests that Congress believed it was conferring the same protection on federal employees generally that military medical employees already enjoyed. H.R. Rep. No. 700, *supra*, at 4. It would thus be ironic and unwarranted now to hold that those medical personnel enjoy less protection from individual actions than their counterparts in the federal service.[11]

Moreover, there is a provision of the Reform Act that specifically defines those remedies against in-

[11] When the House Report on the Reform Act noted the legislation's intention that "any claim against the government that is precluded by the exceptions set forth in [28 U.S.C. 2680] is also precluded against an employee [or] his or her estate," it cited *Powers* v. *Schultz*, *supra*, with approval. In that case, the Fifth Circuit held—contrary to the Ninth Circuit's ruling and the government's concession in this case—that the Gonzalez Act "makes suit against the United States the *only* remedy for negligent acts of a military physician acting within the scope of his duties, regardless of whether suit is foreclosed on other grounds, be it the absence of liability * * *, or the foreign-country exception to the FTCA, as here." 821 F.2d at 298.

Whether or not the Committee Report was "correct" in its understanding of the Gonzalez Act, it confirms the intention of the Reform Act to create a uniform regime for *all* federal employees, including those in Dr. Marshall's position in this case. It was not Congress's intention to confer on a plaintiff a greater right to sue a government employee for injury occurring overseas if the injury was caused by an Army surgeon than that plaintiff would have if the injury was caused by an Army truck driver.

dividual employees that are excluded from its coverage. Under 28 U.S.C. 2679(b)(2), the Reform Act is not applicable to actions against individuals for violation of constitutional rights or to actions "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." In this case, Dr. Marshall has not been sued for a "violation" of the Gonzalez Act, and thus the action is not authorized by the express limitations on the Reform Act. See H.R. Rep. 700, *supra*, at 7. Particularly in view of the fact that the Reform Act specifies categories of cases to which it does not apply, there is no room for the implied exception found by the Eleventh Circuit in *Newman* v. *Soballe*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 88-5757

MARCUS S. SMITH; HILDEGARD U. SMITH,
PLAINTIFFS-APPELLANTS

v.

WILLIAM MARSHALL, JR., M.D., DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Central District of California

Argued and Submitted Dec. 9, 1988
Decided Sept. 26, 1989

Before: HALL, WIGGINS and THOMPSON, Circuit Judges

DAVID R. THOMPSON, Circuit Judge:

This is a medical malpractice suit against a military physician. Jurisdiction in the district court was founded on diversity of citizenship. The case presents two questions never addressed by this circuit: (1) whether an American military physician working in a foreign country is immune from a malprac-

tice suit under 10 U.S.C. § 1089 (1982)[1] and (2) whether the physician is immune from suit under the recently enacted Federal Employees Liability Reform and Tort Compensation Act of 1988 ("FELRTCA"). FELRTCA, Pub. L. No. 100-694, 102 Stat. 4563 (1988). The district court dismissed the complaint against the physician, substituted the United States as a defendant, and then dismissed the action. We have jurisdiction under 28 U.S.C. § 1291. We reverse.

FACTS AND PROCEDURAL HISTORY

Sergeant Marcus Smith was stationed in Italy. William Marshall, M.D. worked as a military physician in the Army medical facility in Vicenza, Italy. He treated Hildegard Smith, Sergeant Smith's wife, during the birth of the Smiths' son, Dominique. The Smiths allege that, as a result of Dr. Marshall's negligence, Dominique sustained massive brain damage.

After the briefs were filed in this appeal, Congress enacted the FELRTCA. FELRTCA's purpose is "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." FELRTCA 2(b), 102 Stat. at 4564. FELRTCA applies to all actions pending on the date of its enactment and is therefore relevant in this appeal. FELRTCA § 8(b), 102 Stat. at 4565-66.

10 U.S.C. § 1089

In the district court, the government argued that 10 U.S.C. § 1089(a) gives the military physician,

[1] Section 1089 is often referred to as the "Gonzalez Act."

Dr. Marshall, absolute immunity from the Smiths' malpractice suit, even though the Smiths have no claim against the government under the Federal Tort Claims Act ("FTCA").[2] The Smiths have no FTCA action because their claim arose in a foreign country. 28 U.S.C. § 2680(k) (1982).

After oral argument, the government filed a supplemental brief in which it abandoned its argument that immunity for Dr. Marshall exists by virtue of section 1089(a). The government did so based upon the Eleventh Circuit's decision in *Newman v. Soballe*, 871 F.2d 969, 970 (11th Cir. 1989). *Newman* was decided after oral argument in the present case. The government now relies solely on FELRTCA to support its contention that Dr. Marshall is entitled to immunity. We discuss FELRTCA later in this opinion.

In view of an apparent split among the circuits on the section 1089(a) issue,[3] considering the importance of the issue, the absence of any controlling Ninth Circuit authority, and because the district court relied on the government's section 1089(a) argument and the parties have briefed and argued the question, we address and resolve the section 1089(a) issue in this appeal.

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod.*

[2] For convenience, we use the term "FTCA" to refer to 28 U.S.C. §§ 2671-2680 prior to the FELRTCA amendments.

[3] *Compare Powers v. Schultz*, 821 F.2d 295, 297-98 (5th Cir.1987) (military doctor immune), *with Newman v. Soballe*, 871 F.2d 969, 970 (11th Cir.1989) (doctor not immune), *and Jackson v. Kelly*, 557 F.2d 735, 740-41 (10th Cir.1977) (en banc) (same), *and Pelphrey v. United States*, 674 F.2d 243, 246 (4th Cir.1982) (same).

Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). Section 1089(a) provides in relevant part:

> (a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act of [*sic*] omission of any physician . . . or [*sic*] the armed forces, . . . while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician . . . whose act or omission gave rise to such action or proceeding.

10 U.S.C. § 1089(a) (Supp. I 1984).

Read alone, section 1089(a) does not reveal whether its provisions apply to cases in which sections 1346(b) and 2672 of the FTCA do not provide an alternative remedy.[4] But section 1089(a) is just part of the statute. Section 1089(f) gives the relevant agency head the power to indemnify or provide insurance for a military physician in three specific situations; when the physician is: (1) serving in a foreign country, (2) assigned to work for an organization which is not part of the federal government, or (3) in such circumstances as are likely to preclude

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[4] 28 U.S.C. § 1346(b) gives the district courts exclusive jurisdiction over claims arising under the tort claims procedure chapter of title 28. 28 U.S.C. § 2672 gives top agency officials the power to adjust and settle federal tort claims. Neither statute applies to claims arising in a foreign country. 28 U.S.C. § 2680(k) (1982).

the remedies of third persons under the FTCA.[5] The plain meaning of section 1089(f) is that physicians will continue to be personally liable in the three situations specified. If section 1089(a) gives military physicians total immunity, section 1089(f)'s indemnification provisions are virtually meaningless. *See Newman v. Soballe*, 871 F.2d 969, 974 (11th Cir. 1989); *Anderson v. O'Donoghue*, 677 P.2d 648, 651 (Okla. 1983); *cf. Jackson v. Kelly*, 557 F.2d 735, 740 (10th Cir. 1977) (en banc). We must interpret section 1089 as a whole and try to give full effect to all of its subsections. *See United States v. Fields*, 783 F.2d 1382, 1384 (9th Cir. 1986); *see also Newman*, 871 F.2d at 974 ("Because subsection (f) was written into the Gonzalez Act, we are required to give it meaning.").

The government initially argued in the district court that section 1089(f) is not superfluous because the section protects medical personnel serving abroad when they are sued in foreign courts. *See Powers v. Schultz*, 821 F.2d 295, 297 (5th Cir. 1987). This argument has two flaws.

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[5] Section 1089(f) provides in relevant part:

> (f) The head of the agency concerned may . . . hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical . . . functions . . . while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damages or injury.

10 U.S.C. § 1089(f) (Supp. I 1984).

First, this interpretation is unnecessarily contrived. Nothing in section 1089(f) even hints at the possibility that any of its provisions only apply to suits brought in foreign courts. And we doubt that Congress intended to require victims of alleged military medical malpractice to bring suit in foreign courts to secure judicial relief. *See Newman*, 871 F.2d at 975, 976-77 & n.12.

Second, the government's previous construction of section 1089(f), which it asserted in the district court and before this court, fails to account for section 1089(f)'s other provisions. These provisions allow agency heads to indemnify or provide insurance for medical personnel who are detailed for service outside the federal government or are in circumstances likely to prevent third persons from obtaining relief under the FTCA. *See Newman*, 871 F.2d at 977; *cf. Anderson*, 677 P.2d at 651 (discussing section 1089(f)'s provisions for service outside the federal government).

We conclude that section 1089(a) does not give Dr. Marshall immunity from the Smiths' suit. This conclusion is consistent with the position adopted by a majority of courts which have interpreted section 1089. *See Newman*, 871 F.2d at 970; *Pelphrey v. United States*, 674 F.2d 243, 246 (4th Cir. 1982); *Jackson*, 557 F.2d at 740; *Burchfield v. Regents of University of Colorado*, 516 F. Supp. 1301, 1304 (D. Colo. 1981); *Anderson*, 677 P.2d at 651.

We have also reviewed section 1089's legislative history and conclude that Congress did not intend to leave people like the Smiths without a judicial remedy in this country. *See, e.g.*, S.R. Rep. No. 94-1264, 94th Cong., 2d Sess. 9-10, 13-14, *reprinted in* 1976 U.S. Code Cong. & Admin. News 4443, 4451, 4454-

55; *Newman*, 871 F.2d at 972-73; *Jackson*, 557 F.2d at 740.

Cases interpreting statutes which do not have a provision analogous to section 1089(f) are inapposite. *Cf. Newman*, 871 F.2d at 974 ("the allegedly analogous statutes relied on by the government do not have the equivalent of subsection (f)"). Only three of the cases previously cited by the government merit separate discussion. *Powers v. Schultz*, 821 F.2d 295, 297 (5th Cir. 1987); *Heller v. United States*, 776 F.2d 92 (3d Cir. 1985), *cert. denied*, 476 U.S. 1105, 106 S.Ct. 1948, 90 L.Ed.2d 358 (1986); *Baker v. Barber*, 673 F.2d 147, 148 (6th Cir. 1982) (per curiam). All three cases are distinguishable.

Heller is clearly inapposite. The *Heller* court never reached the question whether a physician serving abroad was immune from suit because the plaintiff was unable to serve any of the individual defendants. *Heller*, 776 F.2d at 95 n.2; *see Newman*, 871 F.2d at 975-76 (distinguishing *Heller* on the same grounds).

Baker is distinguishable for at least two reasons. First, *Baker* involved the construction and harmonization of three statutes: section 1089, the FTCA and the Federal Employee Compensation Act ("FECA"). 673 F.2d at 148. The FECA provides that the "liability of the United States . . . is exclusive and instead of all other liability of the United States . . . under a Federal tort liability statute." 5 U.S.C. § 8116(c) (1982). In *Baker*, the plaintiff was eligible for benefits under the FECA. *Baker*, 673 F.2d at 148. The present case does not involve the FECA.

Second, in *Baker*, a key issue was whether FECA cases qualified under the "circumstances likely to preclude" language of section 1089(f) so that suit could be brought against the Army physician defend-

ants. The Sixth Circuit concluded that the "circumstances" language was inapplicable to create the FECA exception for which the plaintiff contended.

> Congress was aware that federal employees are treated at times by military doctors. Because Congress declined to include [the FECA] situation *in the section of the bill in which it listed other specific exceptions*, this Court will not read the "circumstances" language to exempt from the malpractice immunity statute suits by federal employees.

Baker, 673 F.2d at 150 (emphasis added). Contrary to *Baker*, the case presently before us involves the specific "foreign country" exception of section 1089(f).

In *Powers v. Schultz*, 821 F.2d 295, 297-98 (5th Cir. 1987), the plaintiff sued a military doctor for malpractice which allegedly occurred in a foreign country. The Fifth Circuit held that section 1089(a) and the FTCA barred the suit. "When suit falls [under section 1089(a)] and there can be no recovery [under the FTCA], the plaintiff has reached the end of the line." *Powers*, 821 F.2d at 298 (quoting *Jones v. Newton*, 775 F.2d 1316, 1318 (5th Cir. 1985)); *see also* 28 U.S.C. § 2680(k). The Fifth Circuit dismissed the suit.

Powers is distinguishable. The plaintiff-appellant in *Powers* did not contest "the substitution of the United States as party defendant or . . . the district court's holding that the United States is immune from suit." 821 F.2d at 296. In this case, the propriety of substituting the United States as defendant is a central issue. *See Newman*, 871 F.2d at 975 (distinguishing *Powers* on the same basis). Furthermore, *Powers*' authority is undercut by the

court's failure to discuss or distinguish cases such as *Jackson* or *Pelphrey* which appear to directly conflict with the result in *Powers*. To the extent that our opinion is inconsistent with *Powers*, we respectfully decline to follow it.

Our review of section 1089's statutory language, its legislative history, and the relevant case law convinces us that section 1089(a) does not provide a military medical doctor with immunity from suit for medical malpractice which occurs in a foreign country. We now consider whether Dr. Marshall has immunity under FELRTCA.

FELRTCA

The government argues that FELRTCA, an act amending the FTCA, provides an independent source of immunity for Dr. Marshall. The pertinent portions of FELRTCA provide:

> SEC. 5. EXCLUSIVENESS OF REMEDY.
>
> Section 2679(b) of title 28, United States Code, is amended to read as follows:
>
> "(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against

the employee or the employee's estate is precluded without regard to when the act or omission occurred. . . ."

SEC. 6. REPRESENTATION AND REMOVAL.

Section 2679(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. . . ."

"(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions. . . ."

FELTRCA §§ 5-6, 102 Stat. at 4564-65.

We conclude that FELRTCA is inapplicable to this case.

FELRTCA provides that "[t]he remedy against the United States . . . is exclusive of any other civil action or proceeding for money damages . . . against the employee whose act or omission gave rise to the claim. . . ." FELRTCA § 5, 102 Stat. at 4564 (to be codified at 28 U.S.C. § 2679(b)(1)). The foreign country exception to the FTCA exempts the United States from liability on "[a]ny claim arising in a

foreign country." 28 U.S.C. § 2680(k). When Congress enacted FELRTCA it did not amend the FTCA's section 2680(k). FELRTCA is part of the FTCA, and thus the foreign country exception of section 2680(k) remains to preclude an action against the United States on a claim arising in a foreign country. The claim in the present case arose in Italy. The Smiths, therefore, have no remedy against the United States. Because they do not, FELRTCA does not operate to provide Dr. Marshall with immunity.

Had Congress intended to extend FELRTCA immunity to individual government employees for tort claims arising in foreign countries it could have done so quite easily. Indeed, this is just what Congress did with regard to claims against Tennessee Valley Authority employees. Under FTCA, the United States is exempt from liability on "[a]ny claim arising from the activities of the Tennessee Valley Authority." 28 U.S.C. § 2680(*l*). In enacting FELRTCA, Congress included a specific section which provides that "[a]n action against the Tennessee Valley Authority for . . . personal injury or death arising from the negligent . . . act or omission of any employee of the Tennessee Valley Authority while acting within the scope of . . . employment is exclusive of any other civil action or proceeding . . . against the employee." FELRTCA § 9, 102 Stat. at 4566-67. The fact that Congress felt it necessary to specifically mention TVA employees in FELRTCA, strongly suggests that Congress believed that absent specific language in FELRTCA extending FELRTCA immunity to TVA employees, these employees would remain without immunity following the enactment of FELRTCA. *Cf.* 10 U.S.C. § 1089(e)

(modifying the effect of section 2680's assault and battery exception in cases of military malpractice).

Unfortunately, FELRTCA's legislative history is somewhat contradictory. On the one hand, the general purpose of FELRTCA is clear. "It is the purpose of [FELRTCA] to protect Federal employees from personal liability for common law torts committed within the scope of their employment, *while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.*" FELRTCA § 2(b), 102 Stat. at 4564 (emphasis added). And the House Committee emphasized that under FELRTCA "no one who previously had the right to initiate a lawsuit will lose that right." H.R.Rep. No. 100-700, 100th Cong., 2d Sess. 7, *reprinted in* 1988 U.S. Code Cong. & Admin. News 5945, 5951; *see also* 134 Cong. Rec. H4719 (daily ed. June 27, 1988) (remarks of Rep. Wolf) ("In no way does this measure infringe or diminish any legal rights of the individual."); *id.* at S15599-600 (daily ed. Oct. 12, 1988) (remarks of Sen. Grassley); *id.* at S15511-12 (daily ed. Oct. 11, 1988) (remarks of Sen. Humphrey). These legislative statements support our conclusion that FELRTCA did not take away the Smiths' cause of action against Dr. Marshall.

On the other hand, the following statement appears in the House Report:

> The "exclusive remedy" provision of section 5 is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment. Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery. Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee in [sic] his or her estate. See *Edelman v. Federal Housing Administration*, 382 F.2d 594 (2d Cir.1967); *Safeway Portland E.F.C.U. v. Federal Deposit Insurance Corporation*, 506 F.2d 1213 (9th Cir.1974); *Vantrease v. United States*, 400 F.2d 853 (6th Cir. 1968); *Powers v. Schultz*, 821 F.2d 295 (5th Cir.1987).

H.R.Rep. No. 100-700, 100th Cong., 2d Sess. 6-7, 1988 U.S. Code Cong. & Admin. News 5945, 5950. The report does not mention the foreign country exception specifically. The report cites *Powers v. Schultz*, a case to distinguish and decline to follow, but does not discuss cases such as *Jackson* and *Pelphrey* which conflict with *Powers*.

We cannot reconcile the report's promise that the rights of individual claimants would not be diminished, with the assertion that "any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee in [sic] his or her estate." H.R.Rep. No. 100-700, 100th Cong., 2d Sess. 6-7, 1988 U.S. Code Cong. & Admin. News 5945, 5950-51. We conclude that the report is internally inconsistent. But the statutory language is not. And we join the Eleventh Circuit in holding that FELRTCA does not bar medical malpractice claims brought against military personnel serving abroad. *Newman*, 871 F.2d at 971.

CONCLUSION

We reverse the district court's orders which dismissed the medical malpractice claim against Dr.

Marshall, and which substituted the United States for Dr. Marshall and dismissed the action. We remand for further proceedings.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 87-05477 TJH

MARCUS S. SMITH, ETC., ET AL., PLAINTIFFS

v.

WILLIAM MARSHALL, JR., M.D., DEFENDANT

(Jan. 11, 1988)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA

THE HONORABLE TERRY J. HATTER, Judge Presiding

• • • •

"THE COURT: All right. I think your position is well articulated. You point out the decision rendered by Judge Kenyon and perhaps that will aid the Ninth Circuit in reaching some decision here because I'm finding just the opposite, as harsh as that result is, particularly where we have a brain damaged child. In this case, reluctantly I have no other recourse but to follow the law as I interpret it and the Gonzales Act requires that the United States be substituted when there is an immunity suit for claims arising in foreign countries and the remedy that is available was the administrative claim. Two years in which to file such was not done. The statute of limitations would apply there as well.

I'm going to grant the government's motion and ask that the government prepare the proposed order. Thank you.

(Proceedings concluded)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Edythe Schwartz
EDYTHE SCHWARTZ
Court Reporter

1/19/88
Date

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF
CALIFORNIA

No. CV 87-5477-TJH(GHKx)

MARCUS S. SMITH, ETC., ET AL, PLAINTIFFS

v.

WILLIAM MARSHALL, JR., M.D., DEFENDANT

[Filed Jan. 14, 1988]

ORDER GRANTING DEFENDANT'S MOTIONS TO SUBSTITUTE THE UNITED STATES AS DEFENDANT AND TO DISMISS

The motions to substitute the United States as defendant and to dismiss of defendant William Marshall, Jr., M.D. came on for hearing on January 11, 1988 before the Honorable Terry J. Hatter, Jr., United States District Judge. Plaintiffs were represented by Walter A. Oleniewski, Esq. of the law firm of Shulman, Rogers, Gandal, Pordy & Ecker, and Alan Rubin, Esq. Defendant was represented by Nikki Calvano, Trial Attorney, U.S. Department of Justice, Torts Branch, Civil Division and Shari K. Silver, Assistant United States Attorney. This Court has fully considered the papers filed by the parties in connection with the motions and the oral argument of counsel, and for the reasons stated in open Court on January 11, 1988,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant's motion to substitute the United States as defendant pursuant to 10 U.S.C. § 1089(a) is granted.

IT IS FURTHER ORDERED that defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to 28 U.S.C. §§ 2680(k) and 2401 (b) is granted.

IT IS FURTHER ORDERED that defendant recover its costs of suit from plaintiffs.

DATED: This 13th day of January, 1988.

/s/ Terry J. Hatter, Jr.
TERRY J. HATTER, JR.
United States District Judge

Presented By:

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

/s/ Shari K. Silver
SHARI K. SILVER
Assistant United States Attorney
Attorneys for Defendant
United States of America

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-5757

D.C. No. CV-87-5477-TJH

MARCUS S. SMITH; HIDEGARD U. SMITH,
PLAINTIFFS-APPELLANTS

vs.

WILLIAM MARSHALL, JR., M.D.,
DEFENDANT-APPELLEE

[Filed Jan. 25, 1990]

ORDER

Before: HALL, WIGGINS and THOMPSON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. 100-694, 102 Stat. 4563 [the Reform Act], provides:

(a) **Findings.**—The Congress finds and declares the following:

(1) For more than 40 years the Federal Tort Claims Act has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.

(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

(3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.

(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in Westfall v. Erwin, have seriously eroded the common law tort immunity previously available to Federal employees.

(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

(6) The prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.

(7) In its opinion in Westfall v. Erwin, the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful.

(b) **Purpose.**—It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.

Section 4 of the Reform Act, 28 U.S.C. 2674, provides:

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose

act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

Sections 5 and 6 of the Reform Act amend 28 U.S.C. 2679(b) and (d) to provide:

> (b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.
>
> (2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—
>
> > (A) which is brought for a violation of the Constitution of the United States, or
> >
> > (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.
>
> * * * * *

> (d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.
>
> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.
>
> (3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or pro-

ceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1),(2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

Section 8(a)-(b) of the Reform Act, 102 Stat. 4565-4566, provides:

(a) **General Rule.**—This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) **Applicability to Proceedings.**—The amendments made by this Act shall apply to all claims, civil actions, and proceedings pending on, or filed on or after, the date of the enactment of this Act.

Section 9 of the Reform Act, 102 Stat. 456b-4567, 16 U.S.C. 831c-2 and 28 U.S.C. 2674, provides:

(a) **Exclusiveness of Remedy.**—(1) An action against the Tennessee Valley Authority for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Tennessee Valley Authority while acting within the scope of this office or employment is exlusive [*sic*] of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim. Any other civil action or proceeding arising out of or relating to the same subject matter against the employee or his estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a cognizable action against an employee of the Tennessee Valley Authority for money damages

for a violation of the Constitution of the United States.

(b) **Representation and Removal.**—(1) Upon certification by the Tennessee Valley Authority that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding heretofore or hereafter commenced upon such claim in a United States district court shall be deemed an action against the Tennessee Valley Authority pursuant to 16 U.S.C. 831c(b) and the Tennessee Valley Authority shall be substituted as the party defendant.

(2) Upon certification by the Tennessee Valley Authority that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Tennessee Valley Authority to the district court of the United States for the district and division embracing the place wherein it is pending. Such action shall be deemed an action brought against the Tennessee Valley Authority under the provisions of this title and all references thereto, and the Tennessee Valley Authority shall be substituted as the party defendant. This certification of the Tennessee Valley Authority shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Tennessee Valley Authority has refused to certify scope of office or employment under this section, the employee

may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action shall be deemed an action brought against the Tennessee Valley Authority, and the Tennessee Valley Authority shall be substituted as the party defendant. A copy of the petition shall be served upon the Tennessee Valley Authority in accordance with the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Tennessee Valley Authority to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any actions subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the Tennessee Valley Authority and shall be subject to the limitations and exceptions applicable to those actions.

(c) **Retention of Defenses.**—Section 2674 of title 28, United States Code, is amended by adding at the end thereof the following new paragraph:

"With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee

based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.".[1]

The Gonzalez Act, 10 U.S.C. 1089, provides:

Defense of certain suits arising out of medical malpractice

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, the Department of Defense, the United States Soldiers' and Airmen's Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor

[1] The inclusion of this section in 28 U.S.C. 2674 and the reference to the Federal Tort Claims Act ("this chapter") were the result of a drafting error that Congress sought to correct but that was nevertheless carried forward into the Act as enacted. See *Lunsford* v. *Price*, 885 F.2d 236 (5th Cir. 1989); *Springer* v. *Bryant*, No. 89-7272 (11th Cir. Apr. 2, 1990); 134 Cong. Rec. H10,678 (daily ed. Oct. 20, 1988).

shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the action or proceeding is brought, to the Attorney General and to the head of the agency concerned.

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the District Court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought

against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

(f) The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the

remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

(g) In this section, the term "head of the agency concerned" means—

(1) the Director of Central Intelligence, in the case of an employee of the Central Intelligence Agency;

(2) the Secretary of Transportation, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy;

(3) the Board of Commissioners of the United States Soldiers' and Airmen's home, in the case of an employee of the United States Soldiers' and Airmen's Home; and

(4) the Secretary of Defense, in all other cases.

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Supreme Court, U.S.
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No. 89-1646

In The
Supreme Court of the United States
October Term, 1989

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

MARCUS S. SMITH, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS MARCUS, HILDEGARD AND DOMINIQUE SMITH IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Employees Liability Reform and Tort Compensation Act supercedes the Gonzalez Act and deprives the Smiths of the cause of action against a military physician (expressly recognized in subsection (f) of the Gonzalez Act) for medical negligence committed within the scope of his military medical duties overseas.

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UNITED STATES OF AMERICA, ET AL.,

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS MARCUS, HILDEGARD AND DOMINIQUE SMITH IN OPPOSITION

Respondents Marcus, Hildegard and Dominique Smith respectfully ask that the Petition for a Writ of Certiorari sought by the United States to review the judgment of the United States Court of Appeals for the Ninth Circuit entered September 26, 1989 be denied.

SUMMARY OF THE ARGUMENT

The Petition for a Writ of Certiorari is based upon a fundamental misstatement of the holding of the United

States Court of Appeals for the Ninth Circuit in *Smith v. Marshall*, 885 F.2d 650 (9th Cir. 1989).

Contrary to the United States' assertion, the court of appeals did not hold that the Federal Employees Liability Reform and Tort Compensation Act ("the FELRTCA") is inapplicable "whenever an exception to the Federal Tort Claims Act would preclude an award of damages against the United States". Petition at 8.

To the contrary, the court of appeals held (1) that as a military physician Dr. Marshall is susceptible to suit for medical negligence committed within the scope of his military medical duties overseas as provided in the Gonzalez Act, 10 U.S.C. §1089(f); (2) that Dr. Marshall enjoys immunity from personal liability (*i.e.* indemnification by the United States) for any judgment rendered against him in that action as provided in the Gonzalez Act; and (3) that the FELRTCA does not deprive the Smiths of the cause of action against Dr. Marshall provided in the Gonzalez Act.

The holding in *Smith* is consistent with the language, purpose and legislative history of the Gonzalez Act, a federal statute which specifically addresses the immunity *vel non* of military physicians for claims based on medical negligence committed within the scope of their military medical duties overseas.

The holding in *Smith* is also consistent with the FELRTCA, which was enacted to protect federal employees from a perceived erosion in *common law* tort immunity

and was not intended to affect the immunity of federal employees already protected by the Gonzalez Act and other federal immunity statutes.

Consistent with this purpose, the FELRTCA and its legislative history provide no evidence that Congress intended to supercede or impliedly repeal the Gonzalez Act. To the contrary, the FELRTCA expressly states that the exclusive remedy provision (on which the United States relies for the proposition that Dr. Marshall is absolutely immune from suit) "does not extend or apply to a civil action against an employee of the Government which is brought for a violation of a statute of the United States under which such action against the individual is otherwise authorized." *See* 28 U.S.C. §2679(b)(2).

As such, established principles of statutory construction support the court of appeals' holding that the FELRTCA does not supercede the Gonzalez Act, that Dr. Marshall is susceptible to suit under the Gonzalez Act and is entitled to immunity from personal liability for any judgment entered against him in the Smiths' action.

There is no controversy among the courts of appeals concerning the proper resolution of the issue in *Smith*. To the contrary, in the only other discovered case addressing whether the FELRTCA supercedes a pre-existing federal immunity statute, the United States Court of Appeals for the Eleventh Circuit also held that a military physician-defendant was specifically protected by the Gonzalez Act and was therefore not among those federal employees

affected by the FELRTCA. *See Newman v. Soballe*, 871 F.2d 969 (11th Cir. 1989).

If the United States were to prevail on the position advanced in the Petition, the parents of a severely injured tort victim, now seven years old and without cognitive life, will never recover damages that would at least address the enormous cost of caring for their brain-devastated child, and a military physician will avoid a judgment for which the United States would ultimately have indemnified him.

The court of appeals in *Smith* properly held that the FELRTCA does not support this result and that the Gonzalez Act expressly precludes it.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE UNITED STATES MISSTATES THE HOLDING OF THE COURT OF APPEALS IN *SMITH v. MARSHALL*

The United States' assertion that the Supreme Court of the United States should grant *certiorari* to review the decision of the United States Court of Appeals for the Ninth Circuit in *Smith v. Marshall*, 885 F.2d 650 (9th Cir. 1989), is based on a fundamental misstatement of the holding in that case.

Contrary to the United States' assertion, the court of appeals in *Smith v. Marshall* did not hold that the FELRTCA is inapplicable "and thus exposes federal employees to suit in their individual capacity – whenever an exception to the Federal Tort Claims Act would preclude an award of damages against the United States." Petition

at 8. On the contrary, the court of appeals was not called upon to decide an issue of such breadth. Instead, the court of appeals properly delineated the only issues before it as follows: 1) whether an American military physician working in a foreign country is immune from a malpractice suit under the Gonzalez Act, 10 U.S.C. § 1089 (1976)[1] and 2) whether an American military physician working in a foreign country is immune from suit under the recently-enacted Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended at 28 U.S.C. § 2679 (Supp.1989)) *See Smith v. Marshall*, 885 F.2d at 651, App. at 1-2a.[2]

Resolving the first of these issues, the court of appeals properly held that the Gonzalez Act expressly governs the immunity *vel non* of military physicians who commit acts of negligence within the scope of their military medical duties, that subsection (f) of the Gonzalez

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[1] The Gonzalez Act, 10 U.S.C. § 1089, also known as the Medical Malpractice Immunity Act, is part of Chapter 55 of the United States Code, entitled "[m]edical and dental care". The purpose of Chapter 55 "is to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents." *See* 10 U.S.C. § 1071.

[2] Citations to "App." are to the Appendix to the Petition.

Act plainly permits suit against individual military physicians for medical negligence committed overseas,[3] that subsection (f) of the Gonzalez Act accords such physicians immunity from personal liability through indemnification for any judgment rendered against them, and that the Gonzalez Act therefore "does not give Dr. Marshall [absolute] immunity from the Smiths' suit."[4] *See Smith v. Marshall*, 885 F.2d at 653, App. at 6a.

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[3] 10 U.S.C. § 1089(f) provides:

> The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

[4] The court of appeals properly noted that this conclusion is consistent with the position of the majority of courts which have interpreted the Gonzalez Act and with the legislative history, which demonstrates that Congress did not intend to leave victims of medical negligence committed by American military physicians in foreign countries without a judicial remedy. *Smith v. Marshall*, 885 F.2d at 653, App. at 6a.

After the filing of briefs on Dr. Marshall's susceptibility to suit under the Gonzalez Act, the United States withdrew its Gonzalez Act argument entirely,[5] thereby conceding that Dr. Marshall is susceptible to suit under the Gonzalez Act for medical negligence committed by him overseas and must be indemnified for a judgment subsequently rendered against him. In its place, the United States asserted that the FELRTCA, which was enacted during the pendency of the appeal, provided an "independent source" of immunity for Dr. Marshall which superceded [and therefore impliedly repealed] the Gonzalez Act. *Id.* at 654. The United States relied solely upon this interpretation of the FELRTCA to support its contention that Dr. Marshall was entitled to absolute immunity. *See Smith v. Marshall*, 885 F.2d at 651, App. at 3a.

Rejecting this contention, the court of appeals concluded that the FELRTCA "did not take away the Smiths' [Gonzalez Act] cause of action against Dr. Marshall," that the FELRTCA is therefore inapplicable to this case, and that "we join the Eleventh Circuit in holding that [the] FELRTCA does not bar medical malpractice claims brought against military personnel serving abroad." *Id.* at 656, App. at 12-13a.

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[5] The United States did so based on the Eleventh Circuit's decision in *Newman v. Soballe*, 871 F.2d 969 (11th Cir. 1989), which was decided after oral argument in *Smith*. *See Smith v. Marshall*, 885 F.2d at 651, App. at 3a.

Thus, *Smith v. Marshall* does not hold that the FELRTCA is inapplicable whenever an exception to the Federal Tort Claims Act would preclude an award of damages against the United States,[6] only that the FELRTCA does not bar medical malpractice claims cognizable under the Gonzalez Act for the medical negligence of military personnel serving abroad. *Id.*

Significantly, the United States has not asked this Court to review those aspects of the *Smith* decision which concern Dr. Marshall's susceptibility to suit and entitlement to indemnification under the Gonzalez Act. Instead, the United States asks this Court to review the court of appeals' holding that the FELRTCA does not supercede the Smiths' Gonzalez Act remedy against Dr. Marshall.

II. THE COURT OF APPEALS IN *SMITH v. MARSHALL* PROPERLY HELD THAT THE FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT DOES NOT SUPERCEDE OR IMPLIEDLY REPEAL THE GONZALEZ ACT

Underlying each of the positions advanced by the United States is the erroneous assertion that FELRTCA

[6] For this proposition, the United States apparently relies on a portion of the *Smith* opinion, not part of the holding, in which the court of appeals reasoned that the Gonzalez Act expressly provides for a remedy against an individual military physician for medical negligence committed within the scope of his military medical duties in a foreign country and consequently that a subsequently-enacted statute which, like the FELRTCA, simply fails to address a remedy for the same wrong was insufficient to "take away" the Smiths' Gonzalez Act remedy.

impliedly repealed the Gonzalez Act. As set forth below, established principles of statutory construction preclude such a finding and further establish that *Smith v. Marshall* was properly decided.

It is an established rule of statutory construction that implied repeals are not favored and that if effect can reasonably be given to consecutive statutes, the presumption is that the earlier statute is intended to remain in force.[7] *United States v. Vuitch*, 402 U.S. 62 (1971); *Chew Heong v. United States*, 112 U.S. at 536.

Established principles of statutory construction also dictate that a statute dealing with a narrow, precise and specific subject is not submerged by a later-enacted statute covering a more generalized spectrum and that absent a clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of

[7] To find an implied repeal,

> [t]here must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy . . . It must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be.

Chew Heong v. United States, 112 U.S. 536 (1884), *quoting Wood v. United States*, 41 U.S. (16 Pet.) 342 (1842) and *State of South Carolina v. Stoll*, 84 U.S. (17 Wall.) 425 (1873).

the priority of enactment.[8] *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). "The issue breaks down to whether a clear intention otherwise" can be discovered, whether, in short, it can be fairly concluded that the [later statute] operated as a *pro tanto* repeal of [the earlier one]." *Bradley v. Kissinger*, 418 F. Supp. 64 (D.D.C. 1976). Such an intention on the part of the legislature to repeal must be clear and manifest. *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936). It is not enough to show that the two statutes produce differing results when applied to the same facts for that no more than states the problem; rather, when two statutes are capable of co-existence, it is the duty of the courts to regard each as effective. *Morton v. Mancari*, 417 U.S. at 551.

As between the FELRTCA and the Gonzalez Act, only the Gonzalez Act addresses the narrow issue as to the form of immunity applicable to a military physician with respect to claims arising out of medical negligence committed within the scope of his military medical duties

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[8] In *Morton v. Mancari*, this Court articulated:

> The reason and philosophy of the rule is that when the mind of a legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter one such a construction, in order that its words shall have any meaning at all.

417 U.S. at 551.

in a foreign country.[9] As such, unless the FELRTCA expressly repeals the Gonzalez Act, there is no foundation for a finding that the FELRTCA applies to this case.

Far from expressly repealing the Gonzalez Act, the FELRTCA expressly contemplates that other federal statutes may authorize actions against individual federal employees and expressly provides that the FELRTCA shall not be construed in derogation of such statutes. *See* 28 U.S.C. § 2679(b)(2). Thus, Section 5 of the FELRTCA states that the exclusive remedy provision on which the United States relies "does not extend or apply to a civil action against an employee of the Government which is brought for a violation of the Constitution of the United States . . . or for a violation of a statute of the United States under which such action against an individual is otherwise authorized."[10] *See* 28 U.S.C. § 2679(b)(2), App. at 22a.

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[9] As set forth in the legislative history of the Gonzalez Act, Congress expressly recognized that the Federal Tort Claims Act does not apply to actions arising overseas and designed subsection (f) indemnification to immunize a military physician from personal liability for all claims arising in foreign countries. *See* S. Rep. No. 94-1264, 1976 U.S. Code Cong. and Admin. News 4443, 4451.

[10] While the United States questions, without the benefit of authority, whether a Gonzalez Act suit against a military physician is properly characterized as a "violation" of the Gonzalez Act within the meaning of Section 5, no discovered cases have held otherwise.

In addition, at least one court has held that the FELRTCA does not immunize an individual federal employee from suit under 42 U.S.C. § 1985, a federal statute which provides a

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Thus, Congress has nowhere demonstrated an intention to repeal the Gonzalez Act or the host of other pre-FELRTCA immunity statutes tailored to the concerns of specific branches or functions of government. *See e.g.* 22 U.S.C. § 2702 (1980) (immunity statute covering State Department employees); 38 U.S.C § 4116 (1965) (immunity statute covering Veterans Administration employees); 42 U.S.C. § 2458a (1976) (immunity statute covering NASA employees); 42 U.S.C. § 233 (1970) (immunity statute covering Public Health Service employees); 10 U.S.C. § 1054 (1986) (immunity statute covering Department of Defense employees).

That Congress did *not* intend the 1988 enactment of the FELRTCA to impliedly repeal pre-existing immunity statutes is further demonstrated by its 1988 amendment of the Veterans Administration Medical Malpractice Immunity Act, 38 U.S.C. § 4116[11] to state that "the exception [to the United States' liability under the Federal Tort

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remedy for specified conduct (conspiracy to interfere with civil rights) which cannot accurately be described as a "violation" of 42 U.S.C. § 1985. *Washington v. U.S. Postal Service*, 1990 W.L. 36239 (N.D.Ill. 1990). Another court has held that the FELRTCA does not immunize federal employees from suits which "arise under" the United States Constitution or federal statutes. *See Saratoga Sav. and Loan Ass'n v. Federal Home Loan Bank of San Francisco*, 724 F. Supp. 683 (N.D. Cal. 1989).

[11] Significantly, the Gonzalez Act was patterned after and is substantially similar to 38 U.S.C. § 4116, a statute which Congress enacted in 1965 to immunize Veterans Administration employees from personal liability for malpractice

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Claims Act, 28 U.S.C. § 1346(b)] provided in section 2680(h) of title 28 [retaining the United States' sovereign immunity for assault and battery] shall not apply" to claims arising under that Act. This amendment demonstrates Congress' understanding that specific federal immunity statutes would remain effective notwithstanding the FELRTCA. The 1988 amendment of the Veterans Administration Medical Malpractice Immunity Act to provide a remedy for assault and battery,[12] a cause of action likely to arise out of a physician's failure to provide a patient with informed consent, also evidences Congress' intent to tailor immunity statutes to the particular functions of specific federal employees and to compensate victims of their negligence.

Because the FELRTCA and its legislative history do not support a finding that the FELRTCA impliedly repeals or otherwise supercedes the Gonzalez Act, the court of appeals properly reconciled the statutes by holding, in conformity with the only other court of appeals to have addressed this issue, that as a military physician Dr. Marshall is specifically protected by the Gonzalez Act

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judgments and to compensate malpractice victims. *See* 38 U.S.C. § 4116. In addition to having identical purposes, each act contains an almost identical opening subsection in which the Federal Tort Claims Act is made the "exclusive remedy" for specific torts. *See* 10 U.S.C. § 1089(a) and 38 U.S.C. § 4116(a). Each act also contains a subsection which, in almost identical terms, permits suit against an individual physician for medical negligence arising in a foreign country and provides that the physician shall be indemnified for any judgment rendered against him in that action. *See* 10 U.S.C. § 1089(f) and 38 U.S.C. § 4116(e).

[12] The Gonzalez Act so provides at 10 U.S.C. § 1089(e).

and is not among those federal employees affected by the FELRTCA. *See Newman v. Soballe*, 871 F.2d at 969, 971 (11th Cir. 1989), and Section V, *infra*.

III. THE HOLDING OF THE COURT OF APPEALS IN *SMITH v. MARSHALL* IS CONSISTENT WITH THE PURPOSE AND LEGISLATIVE HISTORY OF THE GONZALEZ ACT AND THE FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT

Properly stated, the holding in *Smith* is consistent with the FELRTCA's stated purpose "to protect federal employees from personal liability for common law torts committed within the scope of their employment". *See* Petition at 13, 21a. Indeed, the court of appeals held that the Gonzalez Act plainly immunizes Dr. Marshall from personal liability for any judgment rendered against him in the Smiths' action. As such, the holding in *Smith* does not expose Dr. Marshall or other federal employees to personal liability[13] and is consistent with the stated purpose of the Gonzalez Act and the FELRTCA.

Moreover, as stated in its preface, the FELRTCA was enacted to protect federal employees from a perceived erosion in *common law* tort immunity caused by this

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[13] Thus, the United States' assertion that *Smith v. Marshall* "renew[s] the threat of individual liability," "impede[s] the ability of the government to perform its responsibilities" and "expose[s] a half million urban federal employees in the Ninth Circuit to liability" is plainly wrong. Petition at 9.

Court's decision in *Westfall v. Erwin*,[14] 484 U.S. 292 (1988), not to amend or repeal immunity statutes already enacted by Congress.[15] Indeed, this Court in *Westfall* appeared

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[14] Because the defendants in *Westfall* were executive branch employees not covered by then-existing federal immunity statutes, the sole issue in *Westfall* was the immunity *vel non* to be accorded those employees under common law principles of immunity. In resolving this issue, this Court explained that official immunity should obtain only when the central purpose of official immunity, promoting effective government, outweighs the human cost associated with depriving a tort victim of a judicial remedy:

> This Court has always recognized . . . that official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official. Moreover, absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct. We therefore have held that absolute immunity for federal officials is justified only when the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens.

484 U.S. at 294. This Court consequently held that federal employees are not entitled to common law immunity unless the challenged conduct is within the outer perimeter of the employees' duties *and* is discretionary in nature.

[15] In addition, the established principle that liability under the Federal Tort Claims Act is determined according to the substantive law of the place in which the alleged negligence occurred may mandate a finding that the substantive law of Italy, not the [American] common-law of tort, will govern this action. *See e.g. Rayonier, Incorporated v. United States*, 352 U.S.

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to endorse the Gonzalez Act and other existing function-specific immunity statutes by articulating that whether immunity is warranted in a particular context should depend on the degree to which the official function would suffer under the threat of potential litigation and consequently that a determination as to the propriety of shielding an official from suit should be based on a "functional" inquiry, *i.e.*, immunity attaches to particular official functions, not to particular offices. In this Court's view, the adoption of a functional approach properly addressed the concern that federal officials enjoy immunity only insofar as the benefits of immunity outweigh the costs. *See Westfall v. Erwin*, 484 U.S. at 296, n. 3.

Significantly, neither the *Westfall* decision nor the legislative history of the subsequently-enacted FELRTCA supports the United States' assertion that the FELRTCA was designed to cover the entire federal work force with one unified scheme of immunity, thereby superceding and impliedly repealing all pre-existing immunity statutes (including those which, like the Gonzalez Act, expressly recognize that military physicians should be qualifiedly rather than absolutely immune from tort liability in specific circumstances). *See also* 38 U.S.C. § 4116; 42 U.S.C. § 233; 10 U.S.C. § 1054 (other federal immunity

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315 (1957). Neither the FELRTCA nor its legislative history suggests that the FELRTCA was intended to apply in this circumstance. The Gonzalez Act, on the other hand, was designed to apply in precisely this circumstance. *See* S. Rep. No. 94-1264, 1976 U.S. Code Cong. and Admin. News 4443, 4451.

statutes which expressly provide that Veterans Administration medical personnel, Public Health Service medical personnel, and Department of Defense legal personnel should be qualifiedly rather than absolutely immune for tort claims arising in foreign countries.) To the contrary, by suggesting that "Congress is in the best position to legislate [applicable immunity standards]", this Court invited Congress to address the desirability of additional function-specific immunity statutes tailored, like the Gonzalez Act, to minimize the human cost of immunity and to assure that deserving claimants not be deprived of remedies without a significant and corresponding benefit to the efficiency of government.[16]

IV. THE HOLDING OF THE COURT OF APPEALS IN *SMITH v. MARSHALL* DOES NOT CONTRAVENE THE EXPRESS LANGUAGE OF THE FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT

The United States asserts that the holding in *Smith* contravenes the exclusive remedy provision of Section 5

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[16] Significantly, it has been recognized that the chief policy underlying the creation of immunity for lower governmental officials, the desire to encourage "the fearless, vigorous and effective administration of policies of government," does *not* apply to the exercise of medical discretion. This is because the threat of liability for medical negligence does not deter the fearless exercise of medical discretion within government service any more than it deters the fearless exercise of medical discretion outside government service. *See Henderson v. Bluemink*, 511 F.2d 399, 403 (D.C. Cir. 1974).

of the FELRTCA[17]. Even assuming *arguendo* that the FELRTCA applies to medical negligence claims arising in a foreign country, Section 5 does not mandate a finding that federal employees are universally immunized for all torts committed within the scope of employment regardless of whether an alternative federal tort remedy obtains against the United States or against the individual under other federal statutes. Thus, while Congress could expressly have stated that "any other civil action against the employee is precluded without regard to the existence of a remedy against the United States or the existence of a remedy against the individual under any other federal statute," it did not do so in Section 5 or elsewhere in the FELRTCA.

Moreover, other portions of Section 5 of the FELRTCA, codified at 28 U.S.C. § 2679(b)(2), preclude a finding that Congress intended to immunize all federal employees from suits specifically authorized under the

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[17] Section 5 provides:

> [t]he remedy against the United States provided by 1346(b) and 2672 of this title . . . is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

See 28 U.S.C. § 2679(b)(1).

Gonzalez Act. These expressly provide that the "exclusive remedy" provision on which the United States relies "does not extend or apply to a civil action against an employee of the Government which is brought for a violation of a statute of the United States under which such action against the individual is otherwise authorized". *See* 28 U.S.C. § 2679(b)(2) and discussion at Section II, *supra*.

In a futile attempt to counter the clear import of this provision, the United States asserts that the FELRTCA supercedes the Gonzalez Act by providing, in subparagraph (4) of Section 6, codified at 28 U.S.C. § 2679(d)(4), that an action or proceeding subject to paragraphs 1, 2 and 3 of the FELRTCA (including the exclusive remedy provision) "shall proceed in the same manner as any action *against the United States* filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions." 28 U.S.C. § 2679(d)(4). Clearly, this provision articulates circumstances under which suit against *the United States* must be dismissed, is insufficient to preclude suit against the responsible individual expressly authorized under other immunity statutes, and therefore does not warrant an inference that Congress intended to preclude a Gonzalez Act suit against an individual physician for medical negligence committed within the scope of his military medical duties in a foreign country.

In a further attempt to support the assertion that the FELRTCA "expressly" immunizes Dr. Marshall from suits expressly authorized under the Gonzalez Act, the United States turns to Section 6 of the FELRTCA, codified at 28 U.S.C. § 2679(d), which provides for substitution of the

United States as defendant (upon certification by the Attorney General that the employee was acting within the scope of his office or employment) and provides for remand upon the district court's determination that the employee was not acting within the scope of his employment.

The United States seeks to infer from these provisions of Section 6 that an action may not be remanded (and therefore may not be *maintained*) against the employee unless the challenged conduct was outside the scope of his employment. Clearly, Congress envisioned that suits against individual federal employees which arise under the Constitution and federal statutes (as provided in Section 5 of the FELRTCA, codified at 28 U.S.C. § 2679(b)(2)), would necessarily be pursued in federal court and therefore would not be remanded to state court.[18] Beyond this, the very fact that Congress envisioned and approved the pursuit of constitutional or federal statutory actions against individual federal employees is, without more, sufficient evidence that *Smith v. Marshall* was properly decided.

Finally, the manner in which Congress chose to integrate the FELRTCA within Chapter 171 of the Federal Tort Claims Act precludes a finding that Congress intended to foreclose suit against an individual based on

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[18] The FELRTCA contains no provision expressly or impliedly excepting it from the operation of 28 U.S.C. § 1447, the federal statute which applies to all remands for lack of jurisdiction.

the foreign country exception to the Federal Tort Claims Act.[19] *See* 28 U.S.C. § 2680(k). Incontrovertibly, the FELRTCA is part of Chapter 171 of the Federal Tort Claims Act, a chapter which also includes the Section 2680 exceptions to the liability of the United States under the Federal Tort Claims Act. Significantly, Section 2680 expressly states that the provisions of Chapter 171 (including the FELRTCA) shall not apply to claims arising in a foreign country. *See* 28 U.S.C. § 2680(k). This express limitation on the scope of the FELRTCA also supports the court of appeals' holding that the FELRTCA does not supercede the Gonzalez Act or otherwise apply to this case. *See Newman v. Soballe*, 879 F.2d at 971.

V. THERE IS NO CONTROVERSY AMONG THE COURTS OF APPEALS CONCERNING THE HOLDING IN *SMITH v. MARSHALL*

Erroneously, the United States asserts in its Petition that the Fifth and Tenth Circuits have concluded that the FELRTCA applies to *all* tort suits against federal employees who have acted within the scope of their employment, whether or not a claim falls within an exception to

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[19] That Congress chose to place the FELRTCA amendment to the Federal Tort Claims Act within the confines of Chapter 171 cannot be ascertained from the amendment as it appears in the Appendix to the Petition. Only by reading the amendment in the United States Code or other integrated publications is it apparent that the scope of the FELRTCA is expressly limited by the subsection 2680 exceptions to the tort liability of the United States, including Section 2680(k), which excepts the United States from liability for claims arising in a foreign country.

the Federal Tort Claims Act. Petition at 11-12, *citing Mitchell v. Carlson*, 896 F.2d 128, 134-35 (5th Cir. 1990); *Aviles v. Lutz*, 887 F.2d 1046, 1049 (10th Cir. 1989) (emphasis original). In actuality, neither *Mitchell* nor *Aviles* involved the issue as to whether the FELRTCA supercedes or replaces a pre-existing federal immunity statute expressly designed to cover the specific employee and conduct there at issue.

Indeed, of all discovered cases concerning the FELRTCA, only one case (in addition to *Smith*) has addressed whether the FELRTCA supercedes another federal immunity statute. *See Newman v. Soballe*, 871 F.2d at 969. In *Newman*, as in *Smith*, the issue was whether the FELRTCA superceded the Gonzalez Act with respect to claims against military physicians arising out of medical negligence committed in a foreign country. Resolving this issue in the negative, the United States Court of Appeals for the Eleventh Circuit properly held that "[a]s a military physician, [the defendant] is specifically protected by the Gonzalez Act and is therefore not among those federal employees affected by the *Westfall* decision or the [FELRTCA]." *Id.* at 971. The Court further noted that the FELRTCA is part of Chapter 171 of the Federal Tort Claims Act, the provisions of which, by the express terms of Section 2680, do *not* apply to any claim arising in a foreign country. *Id. See also* 28 U.S.C. § 2680(k).

As such, the only courts of appeals to have addressed whether the FELRTCA supercedes the Gonzalez Act's provision for a suit against an individual military physician based on medical negligence claims arising overseas have unequivocally held that it does not. Consequently,

there is no split in the circuits concerning the holding here at issue.

VI. THE HOLDING OF THE COURT OF APPEALS IN *SMITH v. MARSHALL* IS A CORRECT STATEMENT OF FEDERAL STATUTORY LAW AND ANY AMENDMENTS THERETO SHOULD BE LEFT TO CONGRESS

Incontrovertibly, the United States' arguments are designed to one overwhelming end; to prevent Marcus and Hildegard Smith from recovering for the heartbreaking, emotionally and financially devastating injuries which their son Dominique, now seven years old and without cognitive life, suffered as an infant in Dr. Marshall's care. Clearly, Congress did not intend by enacting the statutes at issue to deprive deserving claimants of a remedy and would not have sanctioned the manner in which the United States, for the last four years, has used first one statute and then the other to prevent an innocent, devastated family from obtaining the compensation that would at least address the cost of caring for their brain-devastated child. Nor did Congress intend to prevent recompense simply because the child's father had the misfortune to be stationed abroad in the service of his country when his child was born.

Clearly, both the Gonzalez Act and the FELRTCA evince Congress' intention to protect federal employees from personal tort liability while simultaneously "providing persons injured by the common law torts of federal employees with an appropriate remedy against the United States." App. at 20a. Equally clearly, the holding of the court of appeals in *Smith v. Marshall* unequivocally

accords with the purpose of each statute by permitting the Smiths to pursue a cause of action expressly recognized in subsection (f) of the Gonzalez Act and by confirming the United States' obligation, also set forth in subsection (f), to immunize Dr. Marshall from personal tort liability by indemnifying him from the judgment entered in the Smiths' action.[20]

Under these circumstances, it is impossible to discern error in the decision of the court of appeals. Indeed, if there is error, as the United States asserts, it must be in Congress' failure to have expressly repealed all pre-existing immunity statutes when it enacted the FELRTCA, not in the court of appeals' failure to have adjudicated the repeal of the Gonzalez Act and the many other specific, well-tailored immunity statutes carefully crafted by Congress during the past several decades. If Congress intended to repeal these statutes, there is today no evidence of that intent, and it should be left to Congress to address this issue in the future.

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[20] Curiously, the United States' position in this matter exposes military physicians now protected by Gonzalez Act indemnification to the threat of personal liability for medical malpractice judgments entered in foreign courts. Thus, the United States conceded below that the Federal Tort Claims Act has no jurisdictional reach in foreign tort actions and that the only form of immunity available to military physicians sued in foreign courts is the indemnification provided by subsection (f) of the Gonzalez Act. The United States' position that the FELRTCA supercedes the Gonzalez Act would, if accepted, deprive all military physicians now practicing overseas of the benefit of their only source of immunity from personal liability for foreign judgments, an untenable result which Congress did not legislate or intend.

CONCLUSION

For the aforestated reasons, Respondents Marcus, Hildegard and Dominique Smith respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MARCUS S. SMITH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1646

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MARCUS S. SMITH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondents spend the bulk of the brief in opposition defending a proposition upon which the court of appeals did not rely. In their view, the court's opinion should be read as holding only that FELRTCA (the Reform Act) "does not deprive [them] of the cause of action against Dr. Marshall provided in the Gonzalez Act." Br. in Opp. 2. But the court's opinion simply does not support such a reading. The court plainly held that by its own terms the Reform Act does not apply to this case. In reaching that conclusion, the court did not rely at all on its separate and independent determination that the Gonzalez Act was also not a bar to this suit.

The relevant portion of the court of appeals' opinion reads as follows (Pet. App. 10a-11a (emphasis added)):

> FELRTCA provides that "[t]he remedy against the United States . . . is exclusive of any other civil action or proceeding for money damages . . . against the employee whose act or omission gave rise to the claim . . ." FELRTCA § 5, 102 Stat. at 4564 (to be codified at 28 U.S.C. § 2679(b)(1)). The foreign country exception to the FTCA exempts the United States from liability on "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). When Congress enacted FELRTCA it did not amend the FTCA's section 2680(k). FELRTCA is part of the FTCA, and thus the foreign country exception of section 2680(k) remains to preclude an action against the United States on a claim arising in a foreign country. The claim in the present case arose in Italy. The Smiths, therefore, have no remedy against the United States. *Because they do not, FELRTCA does not operate to provide Dr. Marshall with immunity.*

The basis for the court's refusal to apply the Reform Act is clear. The court held that "because" an exception to the Federal Tort Claims Act precludes suit against the United States, the Reform Act does not confer immunity on Dr. Marshall. The Gonzalez Act is immaterial to this construction of the Reform Act's text. The Gonzalez Act is also irrelevant to the points with which the court sought to buttress that construction – the Reform Act's legislative history and its application to the TVA (Pet. App. 11a-13a).

Respondents assert that "the court of appeals concluded that the FELRTCA 'did not take away the Smiths' *[Gonzalez Act]* cause of action against Dr. Marshall.'" Br. in Opp. 7 (emphasis added). But respondents' bracketed reference to the Gonzalez Act is a misleading revision of the court's opinion. What the court actually said (referring to passages in the legislative history) was: "These legislative statements support our conclusion that FELRTCA did not take away the Smiths' cause of action against Dr. Marshall." Pet. App. 12a. The court of appeals did not invoke the Gonzalez Act in this portion of its opinion. Indeed, as we demonstrate below, there is no such thing as a "Gonzalez Act cause of action." Respondents' effort to suggest otherwise is an unsuccessful attempt to attribute its position to the court.

The rationale on which the court of appeals did rely – that the Reform Act does not confer immunity because the foreign tort exception bars respondents from suing the United States – would be equally applicable to an action against a federal employee who was sued as a result of his involvement in an automobile accident overseas while on official business. Indeed, as we noted in the petition, nothing in the court's reasoning distinguishes the foreign tort exception to the FTCA from any of the other exceptions in 28 U.S.C. 2680 barring suit against the United States. Pet. 18.[1]

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[1] Respondents appear to concede as much when they argue that – because Congress chose to codify the Reform Act in Chapter 171 of Title 28 of the United States Code (28 U.S.C. 2672-2680) – "the scope of [the Reform Act] is expressly limited by the subsection 2680 exceptions to tort liability of the United

The Ninth Circuit's opinion does not, in our view, leave the district courts in that circuit free to adopt respondents' attempted revision of the panel's holding. Rather, as the Fifth Circuit noted, the decision in this case is "largely in conflict" with decisions applying the

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States." Br. in Opp. 21 n.19; see *id.* at 20-21 (noting that Section 2680 provides that "[t]he provisions of this chapter and section 1346(b) of this title shall not apply to" the enumerated exceptions).

Notwithstanding this argument's superficial linguistic appeal, it does not justify restricting the scope of the Reform Act's express immunity and substitution provisions. First, the Reform Act itself, in 28 U.S.C. 2679(d)(4), provides that upon a certification that an individual defendant was acting within the scope of his federal employment, an action against the employee "shall proceed in the same manner as any action against the United States filed pursuant to [28 U.S.C. 1346(b)] and shall be subject to the limitations and *exceptions* applicable to those actions" (emphasis added). The only "exceptions" applicable to actions against the United States under 28 U.S.C. 1346(b) are those categories of claims enumerated in Section 2680 under the heading "Exceptions." Second, the legislative history is crystal clear on this point; "any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee [or] his or her estate." H.R. Rep. No. 700, 100th Cong., 2d Sess. 6 (1988). Third, respondents' interpretation would give rise to absurd results. Although Congress enacted the Reform Act to deal with what it found was an "immediate crisis" arising from the prospect of individual tort actions, respondents' construction would deny the Reform Act any effect in such cases as those involving intentional torts, libel, negligent delivery of mail, and wrongs involving Customs or tax matters.

In any event, respondents' argument goes to the merits of this action and does not affect the suitability of the case for further review.

Reform Act to cases to which the Gonzalez Act does not apply. *Mitchell* v. *Carlson*, 896 F.2d 128, 135 & n.7 (1990). In holding that the Reform Act applied to a suit against an individual federal employee on an assault claim that could not be brought against the United States, the *Mitchell* court addressed the Ninth Circuit's reasoning at length and "decline[d] to follow" it. *Id.* at 135-136. If the Ninth Circuit's decision were as respondents claim, it would have had no potential application to the facts of *Mitchell*.

The petition fairly and accurately describes the Ninth Circuit's interpretation of the Reform Act, the conflict it creates with decisions of other courts of appeals, and its potential for disrupting the scheme that Congress adopted to deal with the problem of suits against individual federal employees. The Ninth Circuit's interpretation of the Reform Act warrants this Court's review.

2. Apart from the fact that respondents' Gonzalez Act argument was not the basis for the court of appeals' judgment, it is also invalid on its merits.[2] Most importantly, that argument rests on a basic mischaracterization of the Gonzalez Act. According to respondents, this statute "recognize[s]," "provide[s]," or makes "cognizable" an action for medical malprac-

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[2] If further review were granted, respondents could present their Gonzalez Act argument as an alternative basis for affirming the judgment. If the Court were to agree with our interpretation of the Reform Act, it could then either reach that argument or remand to allow the court of appeals to consider it in the first instance.

tice against Dr. Marshall. Br. in Opp. i, 2, 8.[3] Thus, respondents contend, they are entitled to prevail unless we can establish that the Reform Act has "deprived" them of, or impliedly repealed, this "Gonzalez Act cause of action" (*id.* at i, 7, 8-14 & n.7). In the same vein, they argue (*id.* at 11 & n.10, 19) that their action against Dr. Marshall is one to which, by its own terms, the Reform Act does not apply because the action has been "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized" (28 U.S.C. 2679(b)(2)). Each of these related arguments is without merit.

The Gonzalez Act, 10 U.S.C. 1089, does not affirmatively authorize the pursuit of any claim against a military physician. To the contrary, with the exception of a narrow category of claims of which this case is an example, the statute *withdraws* whatever right of action an injured plaintiff might otherwise have. Subsection (f) of the Act, on which respondents put particular stress (Br. in Opp. 2, 5-6, 24), does not suggest otherwise. It provides only that the head of an

[3] This conception of the Gonzalez Act pervades all of the arguments in the brief in opposition. See, *e.g.*, Br. in Opp. 11 (suggesting that Gonzalez Act is among the statutes that "authorize actions against individual federal employees"); *id.* at 8 n.6 (referring to "Gonzalez Act remedy"); *id.* at 14-15 (suggesting that claim against a military physician is not a "common law" claim); *id.* at 18 (suggesting that Section 5 of Reform Act does not make an action against the United States the exclusive remedy in this case because that section did not refer to "a remedy against the individual under any other federal statute"); *id.* at 20 (suggesting court of appeals was correct because Congress "envisioned and approved the pursuit of constitutional or federal statutory actions against individual federal employees").

agency employing military physicians "may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for" those physicians assigned to foreign countries. Thus, whatever action a plaintiff may have against such a physician is not created by or derived from the Gonzalez Act. The most that can be said (and then only for some claims) is that the action is not barred.

Because the Gonzalez Act neither creates a cause of action nor confers any right to pursue any claim against an individual military physician, it does not stand in the way of the defense to such claims provided by the Reform Act. There is no need to repeal a statute – the Gonzalez Act – that bars most military medical malpractice claims against physicians and simply authorizes indemnification for the remainder in order to give full effect to a statute – the Reform Act – that duplicates the Gonzalez Act as to some claims and provides additional protection as to others. The two may simply coexist.[4]

[4] It is untenable to suggest, as respondents do (Br. in Opp. 24 n.20), that our position on the Reform Act would prohibit indemnification of physicians for medical malpractice judgments entered in foreign courts. We have never suggested that the Reform Act deprives the Gonzalez Act of all effect, and obviously nothing in the text of the Reform Act prohibits indemnification of physicians or otherwise deprives agencies of their authority to provide indemnification. Similarly, nothing in the Reform Act forecloses the Gonzalez Act's waiver of sovereign immunity for medical malpractice claims framed in terms of assault or battery, 10 U.S.C. 1089(e), or the comparable waivers in other similar statutes, see Br. in Opp. 12-13. The continued effectiveness of provisions like these demonstrates why Congress did not repeal these Acts when it enacted the Reform Act.

Moreover, the Reform Act *expressly* specifies the manner in which a federal statute must operate to create an action maintainable against an individual employee, and the Gonzalez Act does not meet that test. Section 5 of the Reform Act, 28 U.S.C. 2679(b)(2), establishes an exception for actions "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." Where Congress has prescribed the statutory actions that may continue to be brought against individual employees, it would be inappropriate for a court to refer to rules of construction designed for cases in which Congress has not specified its intention – so as to permit the pursuit of additional actions not meeting the statute's criteria. See *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 616-617 (1980).

Of course, there is no sense in which an action against a military physician – even an action not barred by the Gonzalez Act – is either an action for "a violation of" that Act or one "authorized" by the statute.[5]

By mischaracterizing our position, respondents highlight the fundamental defect in their reliance on the doctrine of implied repeal. They are too quick to invoke that doctrine on the basis of asserted conflicts between the Gonzalez Act and the Reform Act that do not exist. Just as nothing in the Reform Act suggests that military physicians may not enjoy all forms of protection conferred by the Gonzalez Act, nothing in the Gonzalez Act suggests that the Reform Act should not confer the same immunity on military physicians that it confers on all other federal employees.

[5] The House committee report on the Reform Act confirms the clear import of this language. It explained that the purpose of 28 U.S.C. 2679(b)(2) was to make clear (H.R. Rep. No. 700, 100th Cong., 2d Sess. 7 (1988))

> that the changes made by this Act do not alter either express or implied statutory rights of action for injunctive relief or damages under the usual rules of construction applied by the Supreme Court in such cases as: *Cort* v. *Ash*, 422 U.S. 66 (1975); *Piper* v. *Chris-Craft Industries*, 430 U.S. 1 (1977); and *Transamerica Mortgage Advisors Inc.* v. *Lewis*, 444 U.S. 11 (1979).

Respondents have no such right of action under the Gonzalez Act.

The Gonzalez Act does not establish any legal duties that may be violated and does not provide any remedies in those suits to which it applies. Whatever cause of action a plaintiff may have against a military physician is derived exclusively from the common law or other sources of civil liability.

3. Congress's decision to confer immunity on individual employees in cases in which an action against the United States is barred may operate to leave an injured person without the right to sue in tort (although, in cases like this, an administrative remedy is potentially available).[6] But when it enacted the Reform Act, Congress made a deliberate choice with full awareness of the consequences. The House committee report on the Act explained (H.R. Rep. No. 700, 100th Cong., 2d Sess. 6 (1988)):

> The "exclusive remedy" provision of section 5 is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the

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[6] See Military Claims Act, 10 U.S.C. 2731 *et seq.* We are advised that respondents filed a claim under this statute, but failed to comply with the relevant statute of limitations.

> scope of employment. Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery. Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee [or] his or her estate.
>
> * * * * *

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MAY 1990

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BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the Federal Employees Liability Reform and Tort Compensation Act of 1988—which provides that the exclusive remedy for torts committed by federal employees acting within the scope of their employment is an action against the United States under the Federal Tort Claims Act—is inapplicable when an exception to the Federal Tort Claims Act precludes relief against the United States.

PARTIES FOR THE PROCEEDING

The petitioners are Dr. William Marshall, Jr., an Army physician, the original defendant below, and the United States of America, which was substituted as defendant by order of the district court.

The respondents, plaintiffs below, are Marcus S. Smith, Hildegard U. Smith, and Dominique Smith.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 885 F.2d 650. The opinion of the district court (Pet. App. 15a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1989. A petition for rehearing was denied on January 25, 1990 (Pet. App. 19a). The petition for a writ of certiorari was filed on April 20, 1990, and was granted on June 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Provisions of the Federal Employees Liability Reform and Tort Compensation Act of 1988 [the Reform Act], Pub. L. No. 100-694, 102 Stat. 4563-4567, and of the Gonzalez Act, 10 U.S.C. 1089, are set forth in an appendix to the petition (Pet. App. 20a-31a). Sections 1346(b), 2671, and 2680 of Title 28 and Section 8 of the Reform Act are set forth in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. In *Westfall* v. *Erwin*, 484 U.S. 292, 300 (1988), this Court held that a federal employee enjoys absolute common-law immunity from state tort liability only if the conduct giving rise to the claim "is within the outer perimeter of [the employee's] duties and is discretionary in nature." The Court added, however, that Congress "is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context" and that "[l]egislated standards governing the immunity of federal employees involved in state-law tort actions would be useful." *Id.* at 300.

Less than a year later, Congress responded with the enactment of the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563-4567 [the Reform Act].[1] The Act's stated purpose is "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate rem-

[1] This statute is also referred to as the "Westfall Act."

edy against the United States." Section 2(b), 102 Stat. 4564; Pet. App. 21a. Congress found that *Westfall* and other decisions limiting the immunity available to federal employees had "created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce." Section 2(a)(5), 102 Stat. 4563; Pet. App. 21a. "The prospect of such liability," Congress determined, would "seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts." Section 2(a)(6), 102 Stat. 4563; Pet. App. 21a.

To eliminate these conditions, the Reform Act makes "[t]he remedy against the United States provided by [the Federal Tort Claims Act] for * * * personal injury * * * resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment * * * exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee." 28 U.S.C. 2679(b)(1). The statute empowers the Attorney General or a court to certify that an employee named as a defendant was acting within the scope of his or her employment at the time of the events giving rise to the claim. 28 U.S.C. 2679(d)(1)-(4). If a certification is issued, then the Reform Act requires the substitution of the United States as the defendant. *Ibid.* The resulting action is "subject to the limitations and exceptions" applicable to FTCA actions commenced against the United States. 28 U.S.C. 2679(d)(4).

2. This case is a medical malpractice action commenced by respondents against petitioner William Marshall, Jr., M.D., a military physician. At the time of the events giving rise to this action, respondent Marcus Smith was a United States Army Sergeant stationed in Italy. In 1982, his wife, respondent Hildegard Smith, was admitted to the United States Army Medical Facility in Vicenza, Italy, where she gave birth to respondent Dominique Smith. Respondents' complaint alleges that Dr. Marshall's negligence during Dominique's delivery caused the child to sustain severe injuries. Pet. App. 2a; R.1. The Attorney General's designate has certified—and it is not disputed—that while Dr. Marshall treated Ms. Smith he was acting within the scope of his employment as an Army physician.

In the district court, the government filed motions seeking substitution of the United States as the defendant and dismissal of the action. The government contended that under the Gonzalez Act, 10 U.S.C. 1089 (Pet. App. 26a-29a), respondents' exclusive remedy was a suit against the United States under the Federal Tort Claims Act and that, because an exception to the Federal Tort Claims Act preserves sovereign immunity with respect to "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k), respondents' suit should be dismissed. The district court granted the government's motions, substituted the United States as the defendant, and entered a final judgment dismissing the action. Pet. App. 15a-18a.

3. While respondents' appeal was pending in the court of appeals, Congress enacted the Reform Act. Because the Act was effective as to cases pending at the time of its enactment (App., *infra*, 4a), the government argued in a supplemental brief on appeal

that the Act required substitution of the United States for Dr. Marshall as the defendant. The government also sought dismissal of the action under 28 U.S.C. 2680(k)—the same disposition that the district court had ordered upon authority of the Gonzalez Act. In the supplemental brief, the government withdrew its reliance upon the Gonzalez Act.[2]

The court of appeals reversed, concluding that the Reform Act is "inapplicable to this case." Pet. App. 10a.[3] The court acknowledged that, under the Re-

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[2] The government's withdrawal of its Gonzalez Act arguments was prompted by *Newman* v. *Soballe*, 871 F.2d 969 (11th Cir. 1989), a decision issued after entry of the district court's judgment in this case. In *Newman*, the Eleventh Circuit held that the Gonzalez Act does not require substitution of the United States in place of a military physician sued for negligence committed abroad. After reviewing *Newman* and other decisions addressing this question, the Department of Justice determined that it would not continue to invoke the Gonzalez Act in cases of this kind. See Pet. 6 n.2.

[3] Although the government no longer relied on the Gonzalez Act, Dr. Marshall requested, *pro se*, that the court of appeals nevertheless consider the potential applicability of that Act. Request of William Marshall, Jr., In Propria Persona, Sept. 11, 1989). The court did so. It held that the Gonzalez Act does not require substitution of the United States in cases, such as actions arising from alleged malpractice abroad, in which 10 U.S.C. 1089(f) gives the relevant agency head the power to indemnify or provide insurance for a military physician. The court stated that the "plain meaning" of this provision "is that physicians will continue to be personally liable in the * * * situations specified." Pet. App. 5a. We have not sought further review of this ruling. (The Reform Act does not contain a comparable provision authorizing indemnification of federal employees; thus, the reasoning underlying the court's interpretation of the Gonzalez Act does not bear on the Reform Act.)

form Act, "[t]he remedy against the United States" conferred by the FTCA "is exclusive of any other civil action or proceeding for money damages . . . against the employee whose act or omission gave rise to the claim." *Ibid.* However, the court continued, since the "foreign country exception to the FTCA [28 U.S.C. 2680(k)] exempts the United States from liability on '[a]ny claim arising in a foreign country,'" respondents "have no remedy against the United States." Pet. App. 10a-11a. "Because they do not," the court concluded, the Reform Act "does not operate to provide Dr. Marshall with immunity." *Id.* at 11a. The court found support for this conclusion in provisions of the Act dealing with employees of the Tennessee Valley Authority and—although the court found it "somewhat contradictory"—in the Act's legislative history. *Id.* at 11a-13a.

SUMMARY OF ARGUMENT

The Reform Act unambiguously requires both substitution of the United States as the defendant in this case and dismissal of the action. The Attorney General's designate has certified—and there is no dispute—that when Dr. Marshall treated Ms. Smith he was acting within the scope of his employment as an Army physician. Under the Act, therefore, the remedy provided by the Federal Tort Claims Act is "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against" Dr. Marshall; this action must now be "deemed an action against the United States"; the United States must "be substituted as the party defendant"; and the suit is "subject to the limitations and exceptions applicable to" FTCA actions commenced against the United States. 28 U.S.C. 2679

(b)(1), (d)(1) and (4). One of those "exceptions," set forth in 28 U.S.C. 2680(k), bars suit against the United States on "[a]ny claim arising in a foreign country." Because respondents' claim is within that exception, their action must be dismissed.

I. A. The court of appeals erred in concluding that the Reform Act is inapplicable because respondents "have no remedy against the United States." The Act makes "the remedy" under the FTCA—whatever relief that remedy may provide—exclusive of any action against an individual employee. 28 U.S.C. 2679(b)(1). Moreover, the Act expressly provides that actions in which the United States has been substituted "shall be subject to the * * * exceptions" applicable to actions commenced against the United States. 28 U.S.C. 2679(d)(4). The "exceptions" to which this provision refers plainly include the foreign country exception and others enumerated in Section 2680; thus, Congress could not have intended that the Reform Act would be inapplicable to actions, such as this one, encompassed by those exceptions.

Two other features of the statutory scheme buttress the conclusion that the exclusivity of the FTCA remedy is not contingent on the existence of a right to recover against the United States. First, provisions authorizing the Attorney General and the courts to certify that employees named as defendants were acting within the scope of their employment and requiring substitution of the United States in their place recognize no exception for cases in which plaintiffs are barred from recovery. 28 U.S.C. 2679(d)(1)-(3). Second, exceptions to the Reform Act preserve the possibility of a suit against a federal employee on federal constitutional and statutory causes of action (28 U.S.C. 2679(b)(2)) that are not actionable under the FTCA. Since Congress saw fit to

provide exceptions for some claims that may not be pursued under the FTCA, it must have intended to make the FTCA remedy exclusive with respect to all other claims arising out of the actions of federal employees within the scope of their employment, whether or not relief is available under that Act.

B. Contrary to respondents' contention (Br. in Opp. 20-21), 28 U.S.C. 2680—which provides that 28 U.S.C. 1346(b) and 2671-2680 "shall not apply" to specified categories of claims, one of which is foreign tort claims—does not limit the breadth of the Reform Act. Although the Reform Act is codified primarily in 28 U.S.C. 2679, it expressly makes actions within its scope "subject to the * * * exceptions" applicable to suits commenced against the United States. 28 U.S.C. 2679(d)(4). Thus, Congress must have contemplated that the Reform Act would govern actions within the exceptions enumerated in Section 2680. Moreover, in making the FTCA the exclusive remedy for tort claims against federal employees, including those claims within FTCA exceptions, the Reform Act follows the settled interpretation of two predecessor provisions. Those provisions, which have also been codified in 28 U.S.C. 2679, have made the FTCA the exclusive remedy for claims against "sue and be sued" federal agencies and against federal employees involved in motor vehicle accidents. By the time Congress enacted the Reform Act, these provisions had repeatedly been held to apply to claims on which suit against the United States was barred by FTCA exceptions or other similar provisions. As Section 2679(d)(4) reflects, Congress anticipated that the Reform Act would receive a parallel construction.

C. The legislative history of the Reform Act addresses the precise point at issue. The House committee report states that "any claim against the government that is precluded by the exceptions set forth in Section 2680 * * * also is precluded against an employee [or] his or her estate." H.R. Rep. No. 700, 100th Cong., 2d Sess. 6 (1988). That is this case.

D. The court of appeals' interpretation of the Reform Act would undercut the Act's express objective and perpetuate the conditions it was designed to eliminate. The Act's declared purpose and legislative findings establish that Congress viewed with alarm the prospect of actions against individual employees and meant to restore broad immunity to the federal workforce. In this light, the Reform Act cannot fairly be construed to permit the many actions against individuals contemplated by the court of appeals' interpretation.

II.A. The Gonzalez Act does not entitle respondents to pursue an action against Dr. Marshall that is prohibited by the Reform Act. The Reform Act includes two express exceptions, which permit an action against a federal employee only when the action is (1) "brought for a violation of the Constitution" or (2) "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. 2679(b)(2). Respondents' action against Dr. Marshall does not qualify for either exception. The first exception—for *Bivens* actions—is entirely inapposite. And as to the second exception, respondents cannot base their claim against Dr. Marshall on a "violation of a statute of the United States." Although the Gonzalez Act authorizes indemnification of military physicians for some claims, it does not establish any duty that a military physician can violate.

B. Respondents have also argued (Br. in Opp. 8-17) that application of the Reform Act to cases like this one would represent an unwarranted implied repeal of the Gonzalez Act. In their view, because the Gonzalez Act authorizes indemnification of military physicians sued for malpractice abroad, those physicians should not be able to invoke the Reform Act.

Respondents' reliance on the presumption against implied repeals is misplaced, for two reasons. First, affording Dr. Marshall the protection that he is due under the Reform Act would in no sense "repeal" the Gonzalez Act. The Gonzalez Act does not create any right of action against a military physician; to the contrary, it *withdraws* the right to pursue most such actions and authorizes insurance or indemnity as to the remainder. Applying the Reform Act to those cases in the second category that fall within that statute's scope does not repeal or otherwise undercut the Gonzalez Act. Second, even if the presumption against implied repeal were applicable, it would not justify withholding from Dr. Marshall the protection to which he is entitled under the Reform Act. That Act applies to "any employee of the Government," a statutorily defined term that unquestionably encompasses all members of the military. 28 U.S.C. 2671, 2679(b)(1). Moreover, one of the Act's express exceptions preserves a limited category of federal statutory claims—those based on a "violation" of a statutory duty. Necessarily, the exception forecloses recognition of an additional, unstated exception for other claims related in some different sense to a federal statute. Finally, the legislative history reflects that Congress intended the Reform Act to apply to cases like this one.

ARGUMENT

I. UNDER THE REFORM ACT, THE EXCLUSIVE REMEDY FOR ALL CLAIMS ARISING FROM TORTS COMMITTED BY FEDERAL EMPLOYEES ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT, EXCEPT FOR CLAIMS ARISING FROM VIOLATIONS OF THE CONSTITUTION OR A FEDERAL STATUTE, IS A SUIT AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT

Congress enacted the Reform Act in 1988 to remedy "the threat of protracted personal tort litigation for the entire federal workforce." Section 2(a)(5), 102 Stat. 4563; Pet. App. 21a. To effectuate that purpose, the statute makes the FTCA the exclusive judicial remedy—excepting only two categories of federal constitutional and statutory actions—for claims for money damages resulting from torts committed by federal employees acting within the scope of their employment. As amended by the Reform Act, 28 U.S.C. 2679(b)(1) declares:

> The remedy against the United States provided by [28 U.S.C. 1346(b) and 2672] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

Only two categories of civil actions against individual federal employees are permitted: (1) actions "brought for a violation of the Constitution of the United States" and (2) actions "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. 2679(b)(2).

To enforce the exclusivity of the FTCA remedy and resolve disputes over whether a federal employee was acting within the scope of his employment, the Reform Act provides for what have come to be known as "scope certifications." The Act empowers the Attorney General, in an action commenced against a federal employee, to certify that the employee was "acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1)-(2).[4] In the event the Attorney General refuses to issue a scope certification, the employee may seek one from the court. 28 U.S.C. 2679(d)(3). Upon issuance of a scope certification by the Attorney General or a court, an action commenced against a federal employee "shall be deemed an action against the United States"

[4] The Attorney General has delegated his authority to issue scope certifications to the United States Attorneys, subject to the oversight of the Assistant Attorney General of the Civil Division of the Department of Justice. 28 C.F.R. 15.3. The Assistant Attorney General's authority with respect to scope certifications has in turn been delegated to, among others, the Director of the Torts Branch. 28 C.F.R. 15.3 App. This official issued the scope certification in this case.

Although the Attorney General's scope certifications are conclusive "for purposes of removal," they are subject to judicial review for purposes of determining whether an action ultimately proceeds against an employee or the United States. *Nasuti* v. *Scannell*, No. 89-1830 (1st Cir. June 29, 1990); *Arbour* v. *Jenkins*, 903 F.2d 416 (6th Cir. 1990).

under Title 28, "and the United States shall be substituted as the party defendant." 28 U.S.C. 2679(d)(1)-(3). The action then "proceed[s] in the same manner as any action against the United States filed pursuant to section 1346(b) of [Title 28] and [is] subject to the limitations and exceptions applicable to those actions." 28 U.S.C. 2679(d)(4).

In view of the certification that Dr. Marshall was acting within the scope of his employment in treating Ms. Smith, the Reform Act unambiguously limits respondents to an action against the United States under the FTCA and requires substitution of the United States as the defendant in Dr. Marshall's place. Further, because suit against the United States is barred by the foreign country exception to the FTCA, 28 U.S.C. 2680(k), the action should be dismissed.[5]

A. Under the Reform Act, the Exclusivity of the FTCA Remedy is not Dependent Upon the Existence of a Right to Recover Against the United States

1. Section 2679(b)(1) states that "[t]he remedy against the United States provided by [the FTCA] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his

[5] In cases like this one, an administrative remedy is potentially available under the Military Claims Act, 10 U.S.C. 2733 *et seq.* See generally 1 L. Jayson, *Handling Federal Tort Claims* § 4.02 (1990). We are advised that respondents filed a claim under this statute and that their claim remains pending, but that there is a substantial question as to whether respondents complied with the relevant two-year statute of limitations. If relief is unavailable under the FTCA and the Military Claims Act, there remains the possibility of a private bill. See *OPM* v. *Richmond*, 110 S. Ct. 2465, 2475 (1990).

office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee * * * or against the estate of such employee." This provision is an unconditional declaration that actions against individual federal employees are precluded. The phrase on which the court of appeals relied—"[t]he remedy against the United States provided by" the FTCA—does not make the exclusivity of the FTCA contingent upon the availability of relief. It is not the equivalent of "if a remedy is available against the United States under" the cited provisions. Rather, "the remedy" is a shorthand reference to the authority possessed by courts and administrative agencies to provide relief for injuries caused by federal employees; as such, "the remedy" takes that authority (and accompanying limitations) as it finds them. "[T]he mandate in * * * the [Reform] Act is clear. An action against a federal employee who has been certified as acting in the scope of her employment must proceed *exclusively* against the United States under the FTCA." *Mitchell* v. *Carlson*, 896 F.2d 128, 134 (5th Cir. 1990).

2. Sections 2679(d)(4) and 2674 confirm that the exclusivity of the FTCA remedy and the substitution of the United States are not affected by the existence of legal defenses that may defeat an individual plaintiff's claim. Under Section 2679(d)(4), an individual action in which a scope certification has been issued "shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of [Title 28] and shall be subject to the limitations and exceptions applicable to those actions." Similarly, the government may invoke, in addition to judicial or legislative immunity available to the individual employee involved, "any other defenses to which the United States is entitled." 28 U.S.C. 2674. These provisions unambiguously require an action in which the United States has been substituted to be treated in the same manner—subject to the same "limitations," "exceptions," and "defenses"—as an action commenced against the United States. *Mitchell* v. *Carlson*, 896 F.2d at 134-35; *Gogek* v. *Brown Univ.*, 729 F. Supp. 926, 931-932 (D.R.I. 1990). The "exceptions" to which Section 2679(d)(4) refers plainly include those enumerated under the title "Exceptions" in Section 2680. Necessarily, therefore, the actions for which the FTCA is the exclusive remedy—and in which the United States must be substituted as the defendant—include actions within these FTCA exceptions. *Aviles* v. *Lutz*, 887 F.2d 1046, 1049 (10th Cir. 1989). There would have been no sense in specifying that actions in which the United States has been substituted under the Reform Act would be "subject to" Section 2680's exceptions if the Act could never apply to those cases in the first place.

3. The procedural provisions of the Reform Act buttress the conclusion that the exclusivity of the FTCA remedy is not dependent on the existence of a right of recovery against the United States in a particular case. The issuance of a scope certification by the Attorney General is contingent only upon a determination that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1)-(2). Further, upon such a certification, "*any* civil action or proceeding commenced upon such claim" shall be deemed an action against the United States, which must be substituted as the defendant. *Ibid.* (emphasis added). The statute does

not suggest that a scope certification may be withheld—or substitution denied—based on a determination that the plaintiff is barred from recovering against the United States.[6]

The exceptions to the Reform Act also demonstrate that the exclusivity of the FTCA remedy is not limited to rights of action on which the FTCA permits recovery. Section 2679(b)(2) preserves the possibility of an individual action for two categories of claims: those "brought for a violation of the Constitution of the United States" and those "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." Significantly, however, "a claim based wholly on violation of the Constitution or of federal statutes is not actionable under the FTCA." 2 L. Jayson, *Handling Federal Tort Claims* § 218.01, at 9-214 & n.2.1a (1990 ed.).[7] The fact that Congress saw fit to provide exceptions in the Reform Act for two categories of claims falling outside the scope of the FTCA suggests that Congress understood that those claims would otherwise be barred. If that is so, it could not have intended that the applicability of Section 2679(b)(1) would depend on the availability of a cause of action against the United States under the FTCA.

4. When it construed the Reform Act, the court of appeals focused exclusively on the first sentence of Section 2679(b)(1). Pet. App. 10a-11a. However, the interpretation of that Act should not be "guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." *Richards* v. *United States*, 369 U.S. 1, 11 (1962). All of the elements of the Reform Act—the provision making the FTCA remedy exclusive of any action for damages against an individual employee, the exceptions to that provision, the procedures through which the guarantee of exclusivity is implemented, and the provisions reserving limitations, exceptions, and defenses to the government—require the conclusion that, with only

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[6] The statute contains no provision permitting the resubstitution of the employee in place of the United States in a case in which recovery against the United States is barred. By contrast, the Gonzalez Act, 10 U.S.C. 1089(c), and other similar statutes have provided, with respect to suits initiated against individual federal employees but removed to federal court upon substitution of the United States:

> Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

This language was not incorporated in the Reform Act. See *Nasuti* v. *Scannell*, slip op. 20 ("[S]o long as the Attorney General's certificate is validly in effect, [an employee against whom suit has been brought] must be deemed conclusively, for removal purposes, to have been acting within the scope of his employment, *and is thus absolutely immune from any civil action or proceeding for money damages.*").

[7] The FTCA waives sovereign immunity only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with *the law of the place where the act or omission occurred.*" 28 U.S.C. 1346(b) (emphasis added); accord 28 U.S.C. 2674 (providing that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances"). In virtually all cases, the effect of these provisions is to require resort to state law. See *Richards* v. *United States*, 369 U.S. 1 (1962). Purely federal statutory or constitutional causes of action are outside the scope of the FTCA's waiver of sovereign immunity.

two express exceptions, the Act bars *all* claims against individual employees.

The court of appeals' interpretation has been rejected by virtually every other court to have considered it. Decisions in three circuits have expressly determined that the Reform Act bars actions against federal employees on claims within exceptions to the FTCA.[8] Several courts of appeals have also held that the Reform Act forecloses actions brought by federal employees against co-employees—even though the Federal Employees' Compensation Act, 5 U.S.C. 8116(c), bars relief under the FTCA in that situation.[9] As these decisions reflect, the Act provides no support for the Ninth Circuit's ruling that the Reform Act permits an action against an employee when the plaintiff has no right to recover under the FTCA.[10]

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[8] *Mitchell* v. *Carlson*, 896 F.2d 128 (5th Cir. 1990) (assault claim); *Aviles* v. *Lutz*, 887 F.2d 1046, 1049 (10th Cir. 1989) (alleged libel and interference with contractual relations); *Nasuti* v. *Scannell*, slip op. 20-22 & n.14, 27, 32 (assault claim). But see *Newman* v. *Soballe*, 871 F.2d 969, 971 (11th Cir. 1989). Three other courts of appeals have applied the Reform Act to cases in which FTCA exceptions bar suit against the United States, albeit without discussing the question whether the Act mandates that result. See *Jordan* v. *Hudson*, 879 F.2d 98 (4th Cir. 1989); *Moreno* v. *Small Business Adm.*, 877 F.2d 715 (8th Cir. 1989); *Yalkut* v. *Gemignani*, 873 F.2d 31, 34 (2d Cir. 1989). See also *Springer* v. *Bryant*, 897 F.2d 1085 (11th Cir. 1990) (prohibiting individual action on claim that could not be pursued against TVA).

[9] See *Sowell* v. *American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989); *Lunsford* v. *Price*, 885 F.2d 236, 237-239 (5th Cir. 1989) (suit against TVA employees).

[10] The court of appeals suggested that Section 9 of the Reform Act, 102 Stat. 4566 (Pet. App. 25a-26a), which deals with suits against TVA employees, supports its interpretation

B. Section 2680 Does Not Limit the Scope of the Reform Act

Section 2680 states that the provisions of Chapter 171 of Title 28 and 28 U.S.C. 1346(b) "shall not apply to" various categories of claims. This Section was intended to itemize claims as to which the United States would retain its sovereign immunity. Respondents contend, however, that it also operates to exempt the enumerated categories of claims from the Reform Act. See *Newman* v. *Soballe*, 871 F.2d 969, 971 (11th Cir. 1989). This contention contradicts the Reform Act's text and the settled interpretation of the FTCA on which Congress relied when it enacted the Reform Act.

1. As noted, Section 2679(d)(4) provides that actions in which the United States has been substituted as the defendant following a scope determination "shall be subject to the limitations and *exceptions*" applicable to actions filed under Section 1346(b). 28 U.S.C. 2679(d)(4) (emphasis added). Thus, Congress must have contemplated that the actions in which the Reform Act would require substitution of the United States—and that could not be pursued against federal employees—would include those subject to the exceptions enumerated in Section 2680.

2. In this respect, Section 2679(d)(4) merely carries forward the structure that the courts have re-

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of the statute. Pet. App. 11a. However, as its text reflects and its sponsor made clear, Section 9 "merely provides that the same protections enjoyed by Federal employees should be enjoyed by TVA employees." 134 Cong. Rec. S15599 (daily ed. Oct. 12, 1988) (remarks of Sen. Heflin). See *Lunsford* v. *Price*, 885 F.2d 236 (5th Cir. 1989); *Springer* v. *Bryant*, 897 F.2d 1085 (11th Cir. 1990). The Fifth Circuit has rejected the inference that the Ninth Circuit drew from Section 9. *Mitchell* v. *Carlson*, 896 F.2d at 135 n.7.

peatedly found to exist in the Federal Tort Claims Act. Before the passage of the Reform Act, Section 2679 included provisions making the FTCA remedy exclusive of actions against federal agencies and actions against federal employees who were involved in automobile accidents while acting within the scope of their employment. The courts had consistently construed these provisions to apply to claims subject to Section 2680's exceptions or equivalent bars to recovery against the United States.

a. From its inception, the Federal Tort Claims Act has provided that "[t]he authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive." 28 U.S.C. 2679(a). By 1988, the courts of appeals had uniformly rejected the equivalent of respondents' contention here: that Section 2680 makes Section 2679(a) inapplicable to claims within FTCA exceptions.[11]

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[11] *E.g.*, *Taylor* v. *Administrator of the Small Business Admin.*, 722 F.2d 105 (5th Cir. 1983); *Northridge Bank* v. *Community Eye Care Center, Inc.*, 655 F.2d 832, 834-835 (7th Cir. 1981); *FDIC* v. *Citizens Bank & Trust Co.*, 592 F.2d 364, 371 (7th Cir.), cert. denied, 444 U.S. 829 (1979); *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Inst.*, 566 F.2d 289, 296-299 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978); *Safeway Portland Employees' Federal Credit Union* v. *FDIC*, 506 F.2d 1213 (9th Cir. 1974); *Edelman* v. *Federal Housing Admin.*, 382 F.2d 594 (2d Cir. 1967); *Goddard* v. *District of Columbia Redevelopment Land Agency*, 287 F.2d 343, 345-346 & n.3 (D.C. Cir.), cert. denied, 366 U.S. 910 (1961); *Freeling* v. *FDIC*, 221 F. Supp. 955 (W.D. Okla. 1962), aff'd per curiam, 326 F.2d 971 (10th Cir. 1963). See also *Peak* v. *Small Business Admin.*, 660 F.2d 375, 377-378 (8th Cir. 1981).

Prior to the enactment of the FTCA, "sue and be sued" agencies were subject to suit on torts committed by their employees within the scope of their employment. See *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381 (1939). Thus, as to these agencies, the effect of the courts of appeals' rulings was to confer immunity from claims that could have been pursued prior to the FTCA's enactment.

In *Safeway Portland Employees' Federal Credit Union* v. *FDIC*, 506 F.2d 1213 (9th Cir. 1974), for instance, the plaintiff filed suit against the FDIC in its own name. The complaint alleged that the FDIC had participated in a scheme to defraud purchasers of certificates of deposit brokered by a bankrupt bank. The agency contended that the suit was barred by 28 U.S.C. 2680(h) (the FTCA exception for misrepresentation, fraud, and deceit claims), and the plaintiff responded that—because Section 2680 provides that the FTCA "shall not apply" to claims of that type—such claims were not "'cognizable' [under 28 U.S.C. 1346(b)] within the meaning of 28 U.S.C. 2679(a)" and thus "the 'sue or be sued' authority of the FDIC is not altered by the FTCA." 506 F.2d at 1215. The court of appeals rejected the plaintiff's argument, explaining (*id.* at 1215-1216):

> The purpose in making the FTCA an exclusive remedy was to permit suit against the United States on certain claims and to prevent suit on those claims, such as misrepresentation and deceit, which were excluded.

Congress took note of the decisions applying Section 2679(a) to torts falling within Section 2680's exceptions when it enacted the Reform Act. The House committee report cited two of those cases in support of the proposition that the Reform Act would

apply to claims within FTCA exceptions.[12] The expectation reflected in the committee report—that the Reform Act would be interpreted in the same manner as an earlier provision occupying an analogous place in the statutory scheme—was entirely reasonable. In view of the many decisions holding that Section 2679(a) protects sue and be sued agencies from actions on claims within FTCA exceptions, Congress could not have supposed that Section 2679(b), as amended by the Reform Act, would fail to protect federal employees—including employees of the very same agencies—from suit on the same claims.

b. When it enacted the Reform Act, Congress also relied on decisions construing the Federal Drivers Act, the statute that was codified in subsections (b) through (e) of Section 2679 before it was displaced by the Reform Act. See 28 U.S.C. 2679(b)-(e) (1982). The Drivers Act made the FTCA the exclusive remedy for "injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." 28 U.S.C. 2679(b) (1982). As in the decisions construing 28 U.S.C. 2679(a), the courts of appeals consistently held that the Drivers Act barred suit against individual drivers even on claims that could not be pursued against the United States under the FTCA.[13] The House committee report on

[12] See H.R. Rep. No. 700, *supra*, at 6-7 (citing *Safeway Portland* and *Edelman* v. *Federal Housing Admin.*, 382 F.2d 594 (2d Cir. 1967)).

[13] *Thomason* v. *Sanchez*, 539 F.2d 955 (3d Cir. 1976) (suit against U.S. barred by *Feres* doctrine), cert. denied, 429 U.S. 1072 (1977); *Carr* v. *United States*, 422 F.2d 1007 (4th Cir. 1970) (suit against U.S. barred by FECA statute); *Van Houten* v. *Ralls*, 411 F.2d 940 (9th Cir.), cert. denied, 396 U.S. 962 (1969) (same); *Noga* v. *United States*, 411 F.2d 943 (9th Cir.), cert. denied, 396 U.S. 841 (1969) (same); *Gilliam* v. *United States*, 407 F.2d 818 (6th Cir. 1969) (same); *Vantrease* v. *United States*, 400 F.2d 853 (6th Cir. 1968) (same). See *Nasuti* v. *Scannell*, 792 F.2d 264, 266 (1st Cir. 1986) (reserving question whether Federal Drivers Act applied to intentional tort suit). See also 42 U.S.C. 2212 (statute making FTCA remedy exclusive of actions against contractors involved in nuclear weapons testing programs); *In re Consolidated United States Atmospheric Testing Litig.*, 616 F. Supp. 759, 765-766 (N.D. Cal. 1985) (holding statute applicable to claims barred by discretionary function exception and *Feres* doctrine), aff'd, 820 F.2d 982 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988).

the Reform Act reflected Congress's reliance on these precedents, citing one of them for the proposition that the Act would protect federal employees even against claims that, because of the applicability of an FTCA exception, could not be pursued against the United States.[14]

[14] H.R. Rep. No. 700, *supra* at 6-7 (citing *Vantrease* v. *United States*, 400 F.2d 853 (6th Cir. 1968)).

In many respects, the Reform Act also followed the form of statutes making the FTCA the exclusive remedy for malpractice claims against medical personnel employed by the military, 10 U.S.C. 1089; the State Department, 22 U.S.C. 2702; the Veterans Administration, 38 U.S.C. 4116; NASA, 42 U.S.C. 2458a; and the Public Health Service, 42 U.S.C. 233. See also 10 U.S.C. 1054 (legal malpractice claims against Department of Defense personnel). At the time of Congress's action on the Reform Act, the courts were divided on the issue whether these statutes precluded actions against federal employees on claims falling within exceptions to the FTCA. Compare *Lojuk* v. *Quandt*, 706 F.2d 1456, 1462 (1983), after remand, 770 F.2d 619, 622-625 (7th Cir. 1985), cert. denied, 474 U.S. 1067 (1986) (38 U.S.C. 4116 does not make FTCA exclusive remedy for intentional tort claim that would be

In view of the decisions that had construed provisions in Section 2679 prior to 1988, Congress could not have intended (or foreseen) that placing the principal provisions of the Reform Act in that Section would render them inapplicable to the categories of claims enumerated in Section 2680. In fact, when Congress provided that actions in which the United States had been substituted under the Reform Act would "be subject to [those] exceptions" (28 U.S.C. 2679(d)(4)), it made explicit the relationship between Sections 2679 and 2680 that the courts had already repeatedly found to exist.

C. The Legislative History of the Reform Act Confirms that Congress Intended to Confer Immunity on Federal Employees from the Claims Enumerated in Section 2680

The Reform Act's legislative history confirms that Congress intended the FTCA remedy to be exclusive even with respect to claims within FTCA exceptions. The House committee report could not be clearer (H.R. Rep. No. 700, *supra*, at 6-7 (emphasis added)):

> The "exclusive remedy" provision of section 5 is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment. *Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery. Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee [or] his or her estate.* See *Edelman* v. *Federal Housing Administration*, 382 F.2d 594 (2d Cir. 1967); *Safeway Portland E.F.C.U.* v. *Federal Deposit Insurance Corporation*, 506 F.2d 1213 (9th Cir. 1974); *Vantrease* v. *United States*, 400 F.2d 853 (6th Cir. 1968); *Powers* v. *Schultz* 821 F.2d 295 (5th Cir. 1987).[18]

As the Fifth Circuit noted, the snippets of legislative history on which the Ninth Circuit relied in this case (see Pet. App. 12a-13a) do not support a different conclusion. *Mitchell* v. *Carlson*, 896 F.2d at 136 ("Isolated language found scattered throughout the legislative history is insufficient persuasion that Congress intended to frustrate the very purpose of the [Reform] Act."). The statement in the House committee report that "no one who previously had the right to initiate a lawsuit will lose that right" (H.R. Rep. No. 700, *supra*, at 7) was addressed to the transitional provisions of the Act. Because the Reform Act was immediately effective, Congress took

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barred by Section 2680(h)); *Anderson* v. *O'Donoghue*, 677 P.2d 648, 650-652 (Okla. 1983) (same result under 10 U.S.C. 1089), with *Powers* v. *Schultz*, 821 F.2d 295 (5th Cir. 1987) (10 U.S.C. 1089 bars suit against military physician on claim subject to FTCA's foreign tort exception). Whatever the merits of these decisions, the legislative history reflects that Congress intended the Reform Act to follow the decision in *Powers* v. *Schultz*. H.R. Rep. No. 700, *supra*, at 6 (citing *Powers* as an indicator of the drafters' intent). See *Sullivan* v. *Finkelstein*, No. 89-504 (June 18, 1990) (Scalia, J., concurring) ("In some situations, of course, the expression of a legislator relating to a previously enacted statute may bear upon the meaning of a provision in a bill under consideration.").

[18] This House Report was the only committee report accompanying the Act. *Cf. Garcia* v. *United States*, 469 U.S. 70, 76 (1984) (committee reports are most authoritative form of legislative history). The Act was discussed only briefly on the floor of each House. See 134 Cong. Rec. 15,962-15,963 (1988); *id.* at 16,243; 134 Cong. Rec. S15,597-S15,600 (daily ed. Oct. 12, 1988); *id.* at H10,677-H10,678 (daily ed. Oct. 20, 1988).

care to assure that FTCA procedural requirements would not operate to deprive persons whose claims had accrued before the enactment of the Reform Act of the opportunity to pursue them. See Section 8(c)-(d) of the Reform Act, 102 Stat. 4566; App., *infra*, 4a-5a. The committee report expressed the intention to preserve these plaintiffs' opportunity to initiate their suits against the United States under the FTCA, but did not suggest that they would be allowed to commence suits against individual employees.

In relying on statements by members of Congress to the effect that the Act was intended to preserve plaintiffs' preexisting legal remedies, the court of appeals also failed to recognize the regime that the legislation's supporters believed had prevailed prior to *Westfall* v. *Erwin*, *supra*. All of the Congressmen who spoke or offered written submissions in support of the legislation took the position that, before *Westfall*, federal employees had been absolutely immune from liability for state-law torts committed while they were acting within the scope of their employment. *E.g.*, 134 Cong. Rec. 15,963 (1988) (remarks of Reps. Frank, Moorhead, and Wolf); 134 Cong. Rec. S15,599-S15,600 (daily ed. Oct. 12, 1988) (remarks of Sens. Heflin and Grassley). See H.R. Rep. No. 700, *supra*, at 2. This was the status quo ante that the legislation was designed to restore—and the frame of reference for assertions that the Act would not deprive plaintiffs of preexisting remedies.[18]

[18] Representative Wolf's written submission, from which the court of appeals quoted (Pet. App. 12a), is typical of the views expressed by the legislation's spokesmen on the floor of both Houses. Before addressing the legislation's effect on preexisting remedies, Rep. Wolf observed that "[p]rior to Westfall, civil servants could operate under the assumption that they were absolutely immune from State common law tort liability." 134 Cong. Rec. 15,963 (1988). Against that background, he explained the intent of the Reform Act as follows (*ibid.* (emphasis added to material quoted by the court of appeals)):

> To return protection to Government workers, H.R. 4612, amends the Federal Torts Claims Act to operate in the way that it effectively has been operating for three decades—as an exclusive remedy. *In no way does this measure infringe or diminish any legal rights of the individual.* Under the legislation, the United States is substituted as the sole defendant in cases alleging that a Federal employee committed a common law tort within the scope of his office or employment. Since the remedy against the Government would be exclusive, no other action or civil suit could be lodged against the employee or his estate, as is the current situation under Westfall.

In short, Representative Wolf recognized that—by contrast to "the current situation under Westfall"—the legislation would not permit an action or civil suit against an employee or his estate. See also *Legislation to Amend the Federal Tort Claims Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 33-38 (1988) (testimony of Rep. Wolf).

No member of Congress suggested that the legislation would preserve the possibility of an individual action against a federal employee for claims that could not be pursued against the United States.

D. The Court of Appeals' Interpretation of the Reform Act Would Violate the Statute's Express Purpose and Preserve the Very Threat of Individual Liability that the Act Was Designed to Eliminate

The findings and declaration of purpose enacted as part of the Reform Act "make clear that Congress's chief aim was to restore and protect federal employees' immunity." *Nasuti* v. *Scannell*, slip op. 16. The

operative provisions of the Act cannot reasonably be construed to preserve the threat of individual litigation that the Act was designed to eliminate.

As we have noted, the Reform Act was prompted by Congress's alarm over the implications of this Court's decision in *Westfall* v. *Erwin*, *supra*. *Westfall* and other decisions, Congress found, had "seriously eroded the common law tort immunity previously available to Federal employees," thereby "creat[ing] an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce." Section 2(a)(4) and (5), 102 Stat. 4563; Pet. App. 20a-21a. Congress also found that this threat of liability would "seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts." Section 2(a)(6), 102 Stat. 4563; Pet. App. 21a. The Act's declared purpose was to eliminate those conditions—*i.e.*, "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." Section 2(b), 102 Stat. 4564; Pet. App. 21a.

A Congress that viewed the prospect of personal liability as "an immediate crisis" and saw expanded immunity as the solution would surely not have left gaps in that immunity as broad as those inherent in the court of appeals' interpretation of the Act. Section 2680 sets forth numerous exceptions to FTCA liability. For example, 28 U.S.C. 2680(b) and (c)

preclude government liability for claims arising out of the miscarriage of mail, the collection of taxes, or the detention of goods in custody. Under the court of appeals' analysis, individual postal or customs workers would be exposed to the threat of suits in their individual capacity for such matters, based on simple negligence. Similarly, federal employees would be subject to personal suit on claims of the types enumerated in 28 U.S.C. 2680(h), including misrepresentation, defamation, or interference with contract rights.[17] Congress's objective of "protect[ing] Federal employees from personal liability for common law torts committed within the scope of their employment" (Pet. App. 21a) supports the conclusion that an action against the United States was intended as the exclusive remedy for all such torts.[18]

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[17] Indeed, under respondents' analysis, there would be no substitution of the United States in a case such as *Barr* v. *Matteo*, 360 U.S. 564 (1959). It is most unlikely that a Congress concerned with the implications of the *Westfall* decision would have failed to provide protection for cases of that type.

[18] See *Lunsford* v. *Price*, 885 F.2d 236, 237 n.5 (5th Cir. 1989) ("The law, in essence, overrules the distinction *Westfall* drew between 'operational' and 'discretionary' capacities, and creates absolute tort immunity for acts of Federal employees within the course and scope of their employment."); *Springer* v. *Bryant*, 897 F.2d 1085, 1086 (11th Cir. 1990) (purpose of the Reform Act was "to create absolute immunity for federal employees who, within the scope of their employment, commit common law torts"). As the House committee report explained (H.R. Rep. No. 700, *supra*, at 4):

> H.R. 4612 would remove the potential personal liability of Federal employees for common law torts committed within the scope of their employment and would instead provide that the exclusive remedy for such torts is

That the purpose of the Reform Act also includes "providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States" (Section 2(b), 102 Stat. 4564; Pet. App. 21a) does not suggest otherwise. Compare Pet. App. 12a. As shown by the findings included in the Act, Congress conceived of the Federal Tort Claims Act—with all of its exceptions—as the only "appropriate" remedy for torts committed by federal employees within the scope of their employment. Congress found that "[f]or more than 40 years the Federal Tort Claims Act ha[d] been *the legal mechanism* for compensating persons injured by the negligent or wrongful acts of Federal employees committed within the scope of their employment." Section 2(a)(1), 102 Stat. 4563; Pet. App. 20a (emphasis added). Indeed, Congress declared that the FTCA had been "the sole means" of providing relief. Section 2(a)(3), 102 Stat. 4563; Pet. App. 20a. When Congress spoke of "an appropriate remedy," it was plainly referring to this *exclusive* remedy and not the amalgam of actions contemplated by the court of appeals' interpretation—*i.e.*, actions against the United States on claims as to which it has waived sovereign immunity plus actions against individuals on other claims to the extent they are not barred by the defendants' *Westfall* immunity.

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through an action against the United States under the Federal Tort Claims Act.

Accord *id.* at 2, 5.

II. THE GONZALEZ ACT DOES NOT FORECLOSE THE APPLICATION OF THE REFORM ACT TO THIS CASE

In the court of appeals and in their brief in opposition, respondents have argued that the Gonzalez Act, 10 U.S.C. 1089, furnishes the basis for an action against Dr. Marshall. As we understand their position, respondents offer two alternative grounds for this conclusion. First, respondents maintain that the Gonzalez Act recognizes a cause of action against a military physician that is preserved by an express exception to the Reform Act—*i.e.*, that their action has been "brought for a violation of" the Gonzalez Act "under which such action against an individual is otherwise authorized." 28 U.S.C. 2679(b)(2)(B). Second, respondents argue that applying the Reform Act to this case would represent an unwarranted implied repeal of the Gonzalez Act. See Br. in Opp. 8-14. Because the court of appeals held that the Reform Act was inapplicable by its own terms to cases in which the foreign tort exception bars a suit against the United States, it did not address either of these grounds. Thus, if the Court agrees with our analysis in Part I, it may wish to remand the case to the court of appeals for its consideration of this issue. But we believe that the issue is ripe for this Court's decision now, and that both grounds advanced by respondents are without merit.

A. Respondents' Action Against Dr. Marshall is Not "Brought for a Violation of" the Gonzalez Act

The Reform Act, in Section 2679(b)(2)(B), permits an action against a federal employee "brought for a violation of a statute of the United States under which such action against an individual is otherwise

authorized." Respondents' action against Dr. Marshall does not qualify for this exception.

The Gonzalez Act has three principal aspects: it provides two forms of protection to military medical personnel who are sued for malpractice committed while they were acting within the scope of their employment and also narrows an FTCA exception as applied to military malpractice claims. First, with respect to employees within its scope, the Act makes the FTCA remedy exclusive and provides procedures comparable in many respects to those of the Reform Act for substituting the United States in place of individuals named as defendants. 10 U.S.C. 1089 (a)-(d).[19] Second, the Gonzalez Act authorizes (but does not require) agency heads to provide insurance or indemnity in cases in which the relevant medical employee "is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury." 10 U.S.C. 1089(f). Third, in providing that the FTCA exception for intentional torts does not apply to medical malpractice claims, the Act has the effect of permitting FTCA actions against the United States based upon allegations that a doctor has performed

[19] Under the court of appeals' interpretation of the Act (which the government no longer challenges, see notes 2-3, *supra*), this form of protection is available only in actions that are not barred by an FTCA exception. The basis for that interpretation is the provision—which has no counterpart in the Reform Act—authorizing insurance or indemnification of military medical personnel. See Pet. App. 4a-6a (relying on 10 U.S.C. 1089(f) in construing exclusive remedy provision of Gonzalez Act).

medical procedures to which the plaintiff did not consent. 10 U.S.C. 1089(e).

Significantly, the Gonzalez Act imposes no legal duty of any kind on anyone. Thus, a military physician cannot "violate" the Act, and there is no such thing as a civil action "brought for a violation of" the Gonzalez Act. 28 U.S.C. 2679(b)(2)(B). Whatever claim a plaintiff may have against a military physician is based exclusively on some other source of law—usually state tort law. In fact, the Gonzalez Act *withdraws* the right to pursue most such claims against individual physicians, and is neutral as to the remainder. Actions against military physicians are thus not among the federal statutory actions preserved by an express exception to the Reform Act.

B. The Gonzalez Act Does Not Otherwise Limit the Scope of the Reform Act

Contrary to respondents' contention, applying the Reform Act to this case would not violate the presumption against implied repeals of statutes.[20] In the first place, affording military physicians the protection of the Reform Act would not constitute a "repeal" of the Gonzalez Act. As we have shown, the latter statute does not provide potential plaintiffs with any affirmative right to pursue an action against a military physician. Its function is not to confer rights on plaintiffs, but "to provide, through application of the Federal Tort Claims Act, protection from individual liability to certain medical personnel while acting within the scope of their official duties," to immunize those personnel from malpractice suits, and to "eliminate the need of malpractice insurance for all such medical personnel." S. Rep. No. 1264,

[20] See generally 1A N. Singer, *Sutherland Statutory Construction* § 23.10 (4th ed. 1985).

94th Cong., 2d Sess. 1 (1976). Application of the Reform Act may render Gonzalez Act insurance or indemnification unnecessary in some cases in which it might otherwise have been appropriate, but that consequence does not entail any withdrawal of Congress's grant of protection to military physicians. Thus, the Reform Act does not repeal or supersede the Gonzalez Act; it provides *additional* protection for some employees within the scope of the earlier Act.

Indeed, indemnification authorized by the Gonzalez Act would continue to be needed in some cases—*i.e.*, actions that foreign courts may permit against individual physicians, see *Powers* v. *Schultz*, 821 F.2d at 297-298. And the Reform Act also has no effect on the Gonzalez Act's waiver of sovereign immunity as to malpractice claims sounding in intentional tort. Thus even after the Reform Act, the Gonzalez Act (and other statutes containing similar provisions, see note 14, *supra*) will serve an important function: authorizing the pursuit of "intentional" malpractice claims against the United States under the FTCA. An express "repeal" of the Gonzalez Act and other statutes would have constituted unwarranted overkill by the drafters of the Reform Act.

Even if the presumption against implied repeal were applicable, it would not justify denying military physicians the protection of the Reform Act in cases like this one. The Reform Act makes the FTCA the exclusive remedy for personal injury "resulting from the negligent or wrongful act or omission of *any employee of the Government*." 28 U.S.C. 2679(b)(1) (emphasis added). Within the framework of the FTCA, the term "employee of the government" is a defined term; it specifically "includes * * * members of the military or naval forces of

the United States." 28 U.S.C. 2671. By its terms, therefore, the Reform Act extends its protection to any member of the military or naval forces of the United States, a class that plainly includes Dr. Marshall and other military medical personnel. This language leaves no leeway for an unstated exception to the Reform Act for those individuals.

Similarly, the all-embracing language of the Reform Act precludes unstated exceptions for particular types of claims. The FTCA remedy is made exclusive of "any other civil action or proceeding for money damages" by reason of a tort committed by a federal employee acting within the scope of his employment, 28 U.S.C. 2679(b)(1); the Attorney General is authorized to issue a scope certification in "any civil action or proceeding" commenced in state or federal court on such a claim, 28 U.S.C. 2679(d)(1)-(2); upon the issuance of a scope certification, "any action or proceeding" in which it was issued must proceed in the same manner as any action against the United States subject to the limitations and exceptions applicable to those actions, 28 U.S.C. 2679(d)(4); and the Act applies "to all claims, civil actions, and proceedings pending on, or filed on or after," its date of enactment, Section 8(b), 102 Stat. 4565-4566; Pet. App. 25a.

Moreover, the narrowly-tailored, express exceptions in 28 U.S.C. 2679(b)(2) for causes of action based upon violations of the Constitution or a federal statute foreclose recognition of an implied exception for other claims. See *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."). Congress has made a statutory ac-

tion against a federal employee contingent upon a "violation" of a statute; it would thus be inappropriate to create an implied exception to the Reform Act for actions that do not satisfy this standard.

Finally, Congress was aware of the implications of making the FTCA remedy exclusive of any other action (save only those based on a violation of the Constitution or a federal statute) against any employee of the government. The House committee report specified that "any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee [or] his or her estate." H.R. Rep. No. 700, *supra*, at 6. The examples cited included *Powers* v. *Schultz*, *supra*, a case indistinguishable from this one.[21] Congress thus clearly intended the result required by the express terms of the Reform Act: preclusion of an action against an individual employee by those in respondents' position.

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[21] Indeed, the citation of *Powers* v. *Schultz*, *supra*, suggests that the drafters thought military physicians already had the protection that the Reform Act was designed to afford to *all* federal employees. Whether or not that impression was correct, there is no doubt that Congress intended physicians to receive the same protection as other employees.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to substitute the United States as the sole defendant and to dismiss the action.

Respectfully submitted.

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JULY 1990

STATUTORY APPENDIX

1. Sections 1346(b), 2761, and 2680 of Title 28 U.S.C., provide as follows:

§ 1346. United States as defendant

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United

States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

§ 2680. Exceptions

The provisions of this chapter [28 U.S.C. 2671-2680] and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs

duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

2. Section 8 of the Federal Employees Liability Reform and Tort Compensation Act of 1988, 102 Stat. 4565-4566, provides as follows:

(a) **GENERAL RULE.**—This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act [Nov. 18, 1988].

(b) **APPLICABILITY TO PROCEEDINGS.**—The amendments made by this Act shall apply to all claims, civil actions, and proceedings pending on, or filed on or after, the date of the enactment of this Act.

(c) **PENDING STATE PROCEEDINGS.**—With respect to any civil action or proceeding pending in a State court to which the amendments made by this Act apply, and as to which the period for removal under section 2679(d) of title 28, United States Code (as amended by section 6 of this Act), has expired, the Attorney

General shall have 60 days after the date of the enactment of this Act during which to seek removal under such section 2679(d).

(d) **CLAIMS ACCRUING BEFORE ENACTMENT.**—With respect to any civil action or proceeding to which the amendments made by this Act apply in which the claim accrued before the date of the enactment of this Act, the period during which the claim shall be deemed to be timely presented under section 2679(d)(5) of title 28, United States Code (as amended by section 6 of this Act) shall be that period within which the claim could have been timely filed under applicable State law, but in no event shall such period exceed two years from the date of the enactment of this Act.

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No. 89-1646

In The

Supreme Court of the United States

October Term, 1990

UNITED STATES OF AMERICA, ET AL.,

Petitioners,

v.

MARCUS S. SMITH, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTION PRESENTED

Whether the Federal Employees Liability Reform and Tort Compensation Act supercedes the Gonzalez Act and deprives the Smiths of the cause of action against a military physician expressly recognized in subsection (f) of the Gonzalez Act for medical negligence committed within the scope of his military medical duties overseas.

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No. 89-1646

In The

Supreme Court of the United States

October Term, 1990

UNITED STATES OF AMERICA, ET AL.,

Petitioners,

v.

MARCUS S. SMITH, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE RESPONDENTS

Respondents Marcus, Hildegard and Dominique Smith respectfully ask this Court to affirm the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 26, 1989.

STATEMENT OF THE CASE

On August 18, 1987, Marcus and Hildegard Smith filed a medical negligence action in the United States District Court for the Central District of California

against military physician William Marshall, M.D. ("Dr. Marshall") to recover for brain-devastation their son Dominique suffered during his birth at an American military hospital in Vicenza, Italy. Federal jurisdiction was based on diversity of citizenship. *See* 28 U.S.C. § 1332.

In November, 1987, the United States filed a Motion to Substitute the United States as the Defendant and to Dismiss the action pursuant to the Medical Malpractice Immunity Act, 10 U.S.C. § 1089, the federal statute which governs the liability *vel non* of military physicians for torts committed within the scope of their military medical duties overseas ("the Gonzalez Act").

In the Motion, the United States asserted that subsection (a) of the Gonzalez Act makes suit against the United States under the Federal Tort Claims Act the exclusive remedy for the negligence of military physicians, that the United States should be substituted as the defendant in lieu of Dr. Marshall pursuant to subsection (c) of the Gonzalez Act, and that the action should be dismissed because the United States retains sovereign immunity for all claims arising in foreign countries[1]. *See* 28 U.S.C. § 2680(k).

The Smiths asked the court to deny the Motion on the ground, *inter alia*, that subsection (f) of the Gonzalez Act expressly permits a medical malpractice claimant to sue a

[1] Because the United States retains sovereign immunity for all claims arising overseas, 28 U.S.C. § 2680(k), the Smiths did not pursue a judicial remedy against the United States.

military physician as an individual for medical negligence arising overseas and that subsection (f) requires the United States to indemnify the physician for any judgment entered against him. 10 U.S.C. § 1089(f), 32 C.F.R. Part 61, 32 C.F.R. § 536.14.

On January 14, 1988, the district court granted the Motion, substituted the United States as defendant, and entered a final judgment dismissing the action for lack of subject matter jurisdiction.[2] From this order, the Smiths appealed to the United States Court of Appeals for the Ninth Circuit.

During the pendency of that appeal, after the filing of briefs and the presentation of oral argument, the United States Court of Appeals for the Eleventh Circuit issued its opinion in *Newman v. Soballe*, 871 F.2d 969 (11th Cir. 1989). In that case, the Eleventh Circuit held that the Gonzalez Act permits suit against a military physician for medical negligence occurring overseas and requires the United States to indemnify the physician for any judgment entered against him.

The United States subsequently withdrew the Gonzalez Act argument, thereby conceding that the

[2] At the time judgment was entered, the United States had not issued a certification as to whether the conduct on which the Complaint is based was within the scope of Dr. Marshall's employment. This certification was issued over two years later, on March 26, 1990, two months after the United States Court of Appeals for the Ninth Circuit denied the United States' Petition for Rehearing.

Gonzalez Act authorizes suit against Dr. Marshall for medical negligence committed by him overseas and entitles him to immunity from personal liability in the form of indemnification for any judgment subsequently entered against him.

In place of its Gonzalez Act argument, the United States asserted that Dr. Marshall was entitled to absolute immunity from suit pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563-4567 ["the FELRTCA"], an amendment to the Federal Tort Claims Act enacted during the pendency of the Ninth Circuit appeal. Although the FELRTCA does not purport to address the immunity *vel non* of military physicians for torts committed overseas, the United States argued that the FELRTCA should be applied in this case to supercede the Gonzalez Act, to require the substitution of the United States as defendant, and to require the dismissal of the Smiths' action pursuant to the foreign country exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(k). The United States relied solely upon this interpretation of the FELRTCA to support its contention that Dr. Marshall was entitled to absolute immunity. *See* Pet. App. at 3a.[3]

The court of appeals denied the United States' request to withdraw its Gonzalez Act argument, properly noting that the district court had dismissed the Smiths'

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[3] Citations to "Pet. App." are to the Appendix to the Petition for Certiorari.

action on the basis of that argument, and delineated the issues before it as follows; 1) whether an American military physician working in a foreign country is immune from a malpractice suit under the Gonzalez Act; and 2) whether an American military physician working in a foreign country is immune from suit under the FELRTCA. *See Smith v. Marshall*, 885 F.2d 650 (9th Cir. 1989), Pet. App. at 1a-2a.

Based on the express language and legislative history of the Gonzalez Act, the court of appeals concluded that subsection (f) of the Gonzalez Act authorizes the Smiths to maintain suit against an individual military physician for medical negligence committed within the scope of his military medical duties overseas and entitles Dr. Marshall to immunity from personal liability for any judgment entered against him in that action. Pet. App. at 4a-5a.

Based on the express language and legislative history of the FELRTCA, the court of appeals held that the FELRTCA does not "take away" the Smiths' cause of action against Dr. Marshall or otherwise bar medical malpractice claims cognizable under the Gonzalez Act for the medical negligence of military physicians overseas. Pet. App. at 12-13a.

The court of appeals consequently reversed the district court order substituting the United States as defendant in place of Dr. Marshall, reversed the district court order dismissing the action, and remanded the action to the district court for further proceedings against Dr. Marshall. Pet. App. at 14a.

Significantly, the United States has conceded that the court of appeals correctly decided the Gonzalez Act issue[4] and has appealed only from the ruling that the FELRTCA does not absolutely immunize Dr. Marshall from suit or otherwise "take away" the Smiths' Gonzalez Act remedy.

SUMMARY OF THE ARGUMENT

The court of appeals properly reversed the district court order which dismissed the Smiths' medical negligence action and properly remanded the action to the district court for further proceedings against Dr. Marshall. This ruling was based on a proper construction and application of the Gonzalez Act, 10 U.S.C. § 1089, the federal statute which governs the liability *vel non* of military physicians for claims based on negligence committed within the scope of their military medical duties overseas. The ruling was also based on a proper finding that the FELRTCA did not supercede or take away the Smiths' Gonzalez Act remedy.

In particular, the court of appeals properly held that subsection (f) of the Gonzalez Act expressly permits the Smiths to sue a military physician for medical negligence

[4] After reviewing *Newman v. Soballe*, 871 F.2d at 969, and other decisions, the Department of Justice conceded that the Gonzalez Act does not require dismissal in medical malpractice cases and that it will no longer file motions of the kind that resulted in the dismissal of the Smiths' Complaint. *See* Brief for Petitioners at 5, n.2.

claims arising in a foreign country and permits the United States to indemnify the physician for the judgment entered against him in that action. *See* 10 U.S.C. § 1089(f); Pet. App. at 4a-5a.

This construction of the language of the Gonzalez Act finds additional express support in the federal regulation implementing the Gonzalez Act, SECNAV Instruction 6300.3, JAG; 14C (March 14, 1978), which mandates that the United States shall pay judgments entered against military physicians based on medical negligence claims arising in foreign countries. *See* Apx. at 1.

The holding of the court of appeals also accords with Congress' intent as expressed in the legislative history of the Gonzalez Act. *See* S. Rep. No. 92-1264, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S. Code Cong. and Admin. News 4443.

In particular, the legislative history demonstrates that Congress intended to enact a two-part scheme of immunity that would protect military medical personnel from personal liability for malpractice judgments and would simultaneously preserve a means of compensating victims of military medical negligence committed in the United States and abroad. *Id.* The first part of this scheme was to foreclose a medical malpractice claimant's ability to choose between two viable defendants (the United States or the individual physician) by making suit against the United States under the Federal Tort Claims Act an "exclusive remedy", thereby precluding suit against the individual physician. *Id.* As the legislative history demonstrates, Congress recognized that the immunity conferred by the "exclusive remedy" language of subsection (a) was limited by the reach of Federal Tort Claims Act jurisdiction and that where such jurisdiction did

not extend (to claims arising in foreign countries, for example) military physicians would continue to be susceptible to suit and personally liable for malpractice judgments entered against them as individuals.

In recognition of this, the "second principle purpose of the [Gonzalez Act]" was to protect the military physician from personal liability for malpractice judgments entered against him in circumstances where the statutory framework of the Federal Tort Claims Act provided no remedy to a claimant (and consequently no protection to a physician) by "authoriz[ing] the Secretary of Defense to hold harmless or provide liability insurance for any defense medical personnel in situations where a remedy under the Federal Tort Claims Act would be precluded." *See* S. Rep. No. 94-1264, *supra*, 1976 U.S. Code Cong. and Admin. News at 4444. *See also Newman v. Soballe*, 871 F.2d at 973 and legislative history cited therein.

In *Smith*, the court of appeals properly held that the FELRTCA did not supercede or take away the Smiths' Gonzalez Act remedy. Pet. App. at 12a. Indeed, nothing in the language of the FELRTCA evidences an intent to supercede the Gonzalez Act or the host of pre-FELRTCA immunity statutes tailored to the concerns of specific branches or functions of government. *See e.g.* 22 U.S.C. § 2702 (1980) (immunity statute covering State Department employees); 38 U.S.C. § 4116 (1965) (immunity statute covering Veterans Administration employees); 42 U.S.C. § 2458a (1976) (immunity statute covering NASA employees); 42 U.S.C. § 233 (1970) (immunity statute covering Public Health Service employees); 10 U.S.C. § 1054 (1986) (immunity statute covering Department of Defense legal personnel).

The legislative history confirms that the FELRTCA was expressly designed to immunize from personal tort liability only those employees not already protected by other immunity statutes, that Congress did not intend to amend or supercede pre-existing immunity statutes, and consequently that the court of appeals properly held that the FELRTCA did not supercede the Gonzalez Act. *See* H. Rep. 100-700, 100th Cong. 2d Sess. 1, 1988 U.S. Code Cong. and Admin. News 5945.

In the only other case addressing whether the FELRTCA supercedes a pre-existing federal immunity statute, the United States Court of Appeals for the Eleventh Circuit construed the language and legislative history of the Gonzalez Act and the FELRTCA and properly concluded that the military physician-defendant was specifically protected by the Gonzalez Act and was therefore not among those federal employees affected by the FELRTCA. *See Newman v. Soballe*, 871 F.2d at 969.

As such, established principles of statutory construction support the court of appeals' holding that Dr. Marshall is susceptible to suit under the Gonzalez Act and is entitled to immunity from personal liability for any judgment entered against him in the Smiths' action.

If the United States were to prevail on the position advanced in its Brief, the parents of a severely injured tort victim, now eight years old and without cognitive life, will never recover damages that would at least address the enormous cost of caring for their brain-devastated child, and a military physician will avoid a judgment for which the United States is required by the applicable statute and implementing regulations to indemnify him. The court of appeals in *Smith* properly held that the FELRTCA does not support this result and that the Gonzalez Act expressly precludes it.

THE COURT OF APPEALS DID NOT ERR IN REVERSING THE DISTRICT COURT ORDER WHICH SUBSTITUTED THE UNITED STATES AS DEFENDANT AND DISMISSED THE SMITHS' ACTION AGAINST DR. MARSHALL

A. THE COURT OF APPEALS CORRECTLY HELD THAT THE GONZALEZ ACT AUTHORIZES SUIT AGAINST DR. MARSHALL AND ENTITLES HIM TO IMMUNITY FROM PERSONAL LIABILITY FOR THE RESULTING JUDGMENT

i. The court of appeals construed and applied the Gonzalez Act in accordance with its expiess language.

In *Smith*, the court of appeals properly held that the Gonzalez Act authorizes a medical malpractice claimant to sue a military physician for medical negligence occurring overseas and entitles the physician to immunity from personal liability for the resulting judgment. Pet. App. at 4a-6a.

In reaching this conclusion, the court of appeals properly applied well-established principles of statutory construction, *e.g.*, the starting point in statutory construction is the language of the statute itself, *Consumer Product Safety Com'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 106 (1980), a statute must be construed as a whole, *Carchman v. Nash*, 473 U.S. 716, 743, n. 11 (1985), and meaning must be attributed to each subsection of a statute. *United States v. Morton*, 467 U.S. 822, 828 (1984); *United States v. Fields*, 783 F.2d 1382 (9th Cir. 1986).

In particular, the court of appeals reasoned that although subsection (a) of the Gonzalez Act refers to the

exclusivity of a remedy against the United States, subsection (f) unequivocally authorizes the relevant agency head to indemnify or provide insurance for a military physician with respect to claims arising in three situations: when the physician is 1) serving in a foreign country; 2) assigned to work in a non-federal facility; or 3) "if the circumstances are such as are likely to preclude the remedies of third persons against the United States as described in [the Federal Tort Claims Act.]"[5] 10 U.S.C. § 1089(f); Pet. App. at 4a-5a. The court of appeals further reasoned that to accord Dr. Marshall absolute immunity would negate the plain meaning of subsection (f), rendering it "virtually meaningless" in violation of the well-established rule that meaning must be attributed to all subsections of a statute. Pet. App. at 5a, *citing United States v. Fields*, 783 F.2d at 1382.

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[5] 10 U.S.C. § 1089(f) states:

> (f) The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

See Pet. App. at 30a.

The court of appeals' holding finds further express statutory support in subsection (c) of the Gonzalez Act, which permits the remand to state court of all claims against individual physicians which arise under circumstances precluding a federal tort claim remedy against the United States. That subsection states:

> (c) . . . Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

10 U.S.C. § 1089(c), Pet. App. at 29a.

Finally, it is well-settled that the administrative regulations promulgated by the agency or other instrumentality charged with enforcing a statute should be attributed weight in determining the meaning of a statute. *Foley Bros. v. Filardo*, 336 U.S. 281 (1949); *Hercules Incorporated v. Environmental Protection Agency*, 598 F.2d 91 (D.C. Cir. 1978). *See also* 2A Sands, Sutherland Statutory Construction § 49.03 (4th ed. 1984). In this case, the court of appeals' interpretation of the Gonzalez Act unequivocally accords with the implementing regulation formulated under authority of the Secretary of the Navy[6]. *See*

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[6] The Secretary of Defense delegated to the Secretary of each Military Department the authority to hold physicians harmless or to provide insurance. *See* 32 C.F.R. Part 61. Although Dr. Marshall was a member of the Army, the Secretary of the Navy has single-service responsibility for all claims arising in Italy. *See* 32 C.F.R. § 750.24 (a),(b)(2).

SECNAV Instruction 6300.3, JAG: 14C (March 14, 1978), Apx. at 1. In pertinent part, that regulation states:

> 6. *Extent of Protection.* [The Gonzalez Act] extends coverage within the United States and its possessions by making suit against the United States under the Federal Tort Claims Act the exclusive remedy for an injured party. Where the Federal Tort Claims Act does not apply (as, for example, where the acts giving rise to the claim occurred outside the United States), coverage is provided by allowing the Secretary of Defense to hold harmless or provide liability insurance for health care personnel.
>
> 7. *Exercise of Authority.* * * * All persons referred to in . . . subsection (a) of [the Gonzalez Act] *are hereby held harmless for damages* resulting from negligent or wrongful acts or omissions while acting within the scope of duties and assigned to duty in a foreign country, or detailed for service with other than a Federal Agency, or if the circumstances are such as are likely to preclude remedy against the United States under the Federal Tort Claims Act, as provided by subsection (f) of reference (b).

See Apx. at 2a (emphasis supplied).

As such, the express language of the Gonzalez Act and the applicable implementing regulation establish that the court of appeals correctly held that Dr. Marshall is susceptible to suit under the Gonzalez Act for medical negligence claims arising in foreign countries and is entitled to immunity from personal liability for any judgment entered against him in that action.

ii. The court of appeals' construction of the Gonzalez Act accords with Congress' intent as expressed in the legislative history

It is well-settled that legislation is never written on a clean slate, read in isolation or applied in a vacuum. *Hust v. Moore-McCormack Lines, Inc.*, 328 U.S. 707 (1946); *Doherty v. United States*, 404 U.S. 28 (1971). *See also* 2A Sands, Sutherland Statutory Construction at § 53.01. Although a court may pronounce upon the purpose of a statute without referring to its historical background, the legal history of a statute, including prior statutes on the same subject, is a valuable guide for determining the intent, meaning and object of a statute. *United States v. Monia*, 317 U.S. 424 (1943); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952).

In *Smith*, the court of appeals analyzed the principal source of legislative history, the Senate Report of the Committee on Armed Services,[7] and properly concluded that Congress did not enact the Gonzalez Act to absolutely immunize Dr. Marshall from suit or to leave people like the Smiths without a judicial remedy, Pet. App. at 6a-7a, *citing* S. Rep. No. 94-1264, 94th Congress, 2d Sess. 9-10, 13-14, *reprinted in* 1976 U.S. Code Cong. and Admin.

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[7] This Court has often recognized that the report of the committee in each House of Congress which investigated the desirability of the statute under consideration is a prime source for determining Congressional intent, particularly where, as in the Report here at issue, the committee has set forth its grounds for recommending passage of the proposed bill and its understanding of the nature and effect of the measure. *See e.g., Rector, Etc. of Holy Trinity v. United States*, 143 U.S. 457, 464 (1892); *Mastro Plastics Corp. v. National Labor Relations Bd.*, 350 U.S. 270 (1956).

News 4443, 4451, 4454-55; *Newman v. Soballe*, 871 F.2d at 972-3; *Jackson v. Kelly*, 557 F.2d 735, 740 (10th Cir. 1977) (en banc).

Analysis of the Senate Report confirms that the court of appeals in *Smith* correctly interpreted and applied the Gonzalez Act. In particular, the legislative history demonstrates that Congress intended to enact a two-part scheme of immunity that would protect military medical personnel from personal liability for malpractice judgments and would simultaneously preserve a means of compensating victims of military medical negligence committed in the United States and abroad.[8] *See* S. Rep. No. 94-1264, 94th Cong., *supra*, 1976 U.S. Code Cong. and Admin. News at 4443.

The first part of this scheme was to foreclose a medical malpractice claimant's ability to choose between two

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[8] As set forth in the legislative history, Congress considered several alternative approaches to protecting defense medical personnel from personal liability for malpractice, including providing indemnification programs and special insurance coverage for *all* such physicians in their individual capacities (a protective scheme under which the existing Federal Tort Claim framework would not be utilized at all) but ultimately chose to immunize certain medical personnel through application of the Federal Tort Claims Act because this alternative did not require any new statutory structure or governmental organization and would be less expensive than providing insurance coverage for *all* defense medical personnel. S. Rep. No. 94-1264, 94th Cong., *supra*, 1976 U.S. Code Cong. and Admin. News at 4447-4448 (emphasis supplied). Clearly, these considerations do not bespeak an intent to foreclose a remedy, only an intent to provide a complete remedy as inexpensively and efficiently as possible.

viable defendants (the United States or the individual physician) by making suit against the United States under the Federal Tort Claims Act an "exclusive remedy", thereby precluding suit against the individual physician. As the legislative history demonstrates, Congress recognized that the immunity conferred by the "exclusive remedy" language of subsection (a) was limited by the reach of Federal Tort Claims Act jurisdiction and that where such jurisdiction did not extend (to claims arising in foreign countries, for example) military physicians would continue to be susceptible to suit and personally liable for malpractice judgments entered against them as individuals.

In recognition of this, the "second principle purpose of the [Gonzalez Act]" was to protect the military physician from personal liability for malpractice judgments entered against him in circumstances where the statutory framework of the Federal Tort Claims Act provided no remedy to a claimant (and consequently no protection to a physician) by "authoriz[ing] the Secretary of Defense to hold harmless or provide liability insurance for any defense medical personnel in situations where a remedy under the Federal Tort Claims Act would be precluded." *See* S. Rep. No. 94-1264, *supra*, 1976 U.S. Code Cong. and Admin. News at 4444. *See also Newman v. Soballe*, 871 F.2d at 973 and legislative history cited therein.

Thus, the Senate Report describes the relationship between subsections (a) and (f) as follows:

> Subsection (a) of the new section 1089 [would make] the remedy against the United States provided by 28 U.S.C. 1346(b) and 28 U.S.C. 2672 the exclusive remedy for damages arising from medical malpractice by certain U.S. medical personnel. . . . [The Federal Tort Claims Act] makes the United States liable, under the local law of

> the place where the tort occurred, in the same manner and to the same extent as a private individual under like circumstances. . . . Suits for damages for personal injury against such medical personnel in their individual capacities are precluded. The sole remedy would be against the United States . . .
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> Subsection (f) would authorize the appropriate Secretary to hold harmless or provide liability insurance for medical personnel described in subsection (a). *The purpose of this section again is to avoid liability being assessed against an individual medical personnel in a situation where the Federal Tort Claims Act would not be applicable. The Federal Tort Claims Act does not apply to actions arising in a foreign country.* Also when a medical personnel is assigned to other than a federal department – for example, as part of his military training a doctor is assigned to a private hospital – he may not be covered under the Federal Tort Claims Act. *Subsection (f) authorizes the appropriate Secretary to provide protection through indemnification or insurance to medical personnel in those situations.*

S. Rep. No. 94-1264, *supra*, 1976 U.S. Code Cong. & Admin. News at 4443, 4450-51 (emphasis supplied).

To implement this statutory scheme, subsection (c) of the Gonzalez Act expressly provides that an action shall be remanded to state court when a remedy by suit within the meaning of subsection (a) is not available against the United States. *See* 10 U.S.C. § 1089(c), Pet. App. at 29a. Significantly, the legislative history of subsection (c) expressly contemplates that, under this section,

> [if] a district court remands the case upon a determination that a remedy by suit under the

> Federal Tort Claims Act *would not be available against the United States, the protection available to medical personnel is set forth in subsection (f).*

S. Rep. No. 94-1264, *supra*, 1976 U.S. Code Cong. & Admin. News at 4450-1 (emphasis supplied).

It is well-settled that statements in the principal committee report are powerful evidence of legislative purpose and may be given effect even in cases where the intent of the legislature is imperfectly expressed in the statute itself. *See e.g., International Tel. & Tel. Corp. v. General Tel. & Electronics Corp.*, 518 F.2d 913 (9th Cir. 1975); *Miller v. Federal Mine Safety and Health Review Com'n.*, 687 F.2d 194 (7th Cir. 1982). In this case, the legislative history of the Gonzalez Act confirms the plain meaning of subsection (f) and virtually required the court of appeals to find, as it did, that military medical malpractice committed in a military hospital in the United States is defended by the United States through its substitution as the proper party defendant, while military medical malpractice committed abroad is defended by the individual with the United States providing indemnity or insurance.[9] *See* S. Rep. No. 94-1264, *supra*, 1976 U.S. Code

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[9] While testimony given during Congressional hearings is generally accorded little weight, *Garcia v. United States*, 469 U.S. 70, 76 (1984), it should be noted that testimony given in connection with the Gonzalez Act also supports the court of appeals' holding that military physicians are not absolutely immune from suits based on claims arising in foreign countries or under other circumstances precluding a federal tort claim remedy. *See e.g.*, Hearings on S. 1395 and H.R. 3954 Before the Subcommittee on General Legislation of the Committee on Armed Services, United States Senate, 94th Cong., 2d Sess. (March 2, August 27 and September 10, 1976); Hearings on

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Cong. and Admin. News at 4443. *See also Newman v. Soballe*, 871 F.2d at 972.

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H.R. 3954 to Provide Statutory Relief from Individual Liability in Malpractice Actions against Military Medical Personnel, Before the Subcommittee on Military Personnel of the Committee on Armed Services, House of Representatives, 94th Cong. (June 5, 1975 and June 17, 1975), pp. 26-29.

At the Senate hearing on the Gonzalez Bill (S. 1395 and H.R. 3954) before the Subcommittee on General Legislation of the Committee on Armed Services, Brigadier General Walter D. Reed, the Assistant Judge Advocate General of the United States Air Force, articulated:

> . . . there are a number of situations in which suit against the United States is not possible. For example, the United States cannot be sued under the (so-called) Federal Tort Claims Act (28 U.S.C. 1346(b), 2671-2680) for claims arising in a foreign country, though other statutes allow the payment of claims – but not suits – in those cases. . . . Or, again, the alleged malpractice may have occurred when the military member was detailed to an agency of a State or a private institution. Finally, there is always the possibility of a suit in a court of a foreign country in circumstances where protection under a treaty, other international agreement, or foreign law is either nonexistent or unavailable.
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> S. 1395 would, if enacted, accomplish the purpose of removing the risk of malpractice litigation to the extent that it is possible for United States law to do so. It appears to have been modeled on the Veterans' Administration and Public Health Service law (38 U.S.C. 4116 and 42 U.S.C. 233). In effect, it makes the so-called Federal Tort Claims Act the exclusive remedy in malpractice and negligence cases involving

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iii. The court of appeals' holding is consistent with the majority of case authorities that have construed the express language and legislative history of the Gonzalez Act

As the court of appeals observed in *Smith v. Marshall*, the conclusion that Dr. Marshall is not entitled to absolute

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> medical care and treatment by active duty military health professionals in the performance of their duties, *but only to the extent that law – slightly modified – now allows suits against the United States.*
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> *Beyond that, the bill relies upon a grant of authority to the Secretary of Defense to hold the health professional harmless, or provide liability insurance for him, to protect him from suits for personal injury or death negligently caused by him in the performance of his medical or related duties.*

See e.g., Hearings on S. 1395 and H.R. 3954 Before the Committee on Armed Services, United States Senate, 94th Cong., 2d Sess. (March 2, August 27 and September 10, 1976 (emphasis supplied).

Similarly, at the Hearing before the Subcommittee on General Legislation of the Committee on Armed Services, Senator Strom Thurmond summarized the two-part scheme of immunity set forth in the Gonzalez Bill as follows:

> This bill would make the remedy against the United States under the Federal Tort Claims Act the exclusive remedy for claims of damage for personal injuries or death arising from alleged malpractice on the part of any active duty medical personnel. *The bill also provides a grant of authority to the Secretary of Defense to hold harmless or provide insurance coverage for personnel performing medical service where provisions of the Federal Tort Claims Act may not be applicable.*

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immunity under the Gonzalez Act is consistent with the position of the majority of courts which have interpreted the Gonzalez Act.[10] Pet. App. at 6a. *See Newman v. Soballe*, 871 F.2d at 970; *Pelphrey v. United States*, 674 F.2d 243 (4th Cir. 1982); *Jackson v. Kelly*, 557 F.2d at 735; *Burchfield v. Regents of University of Colorado*, 516 F. Supp. 1301 (D. Colo. 1982); *Anderson v. O'Donoghue*, 677 P.2d 648 (Okla. 1983); *Afonso v. City of Boston*, 587 F. Supp. 1342 (D. Mass. 1984).

In *Newman v. Soballe*, 871 F.2d at 970, the United States Court of Appeals for the Eleventh Circuit held that neither the Gonzalez Act nor the FELRTCA required the substitution of the United States for the military physician or the dismissal of a medical malpractice action based on the negligence of a military physician practicing abroad. In particular, the Eleventh Circuit held that subsection (f) of the Gonzalez Act and its legislative history plainly establish that Congress intended for military physicians to be susceptible to suit for medical negligence claims arising overseas and entitled to immunity from

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See Malpractice Protection to Defense Medical Personnel, Hearings on S. 1395 and H.R. 3954 Before the Subcommittee on General Legislation of the Committee on Armed Services, United States Senate, 94th Cong., 2d Sess. at pp. 10-12 (March 2, August 27 and September 10, 1976), (emphasis supplied).

[10] The court of appeals properly noted that most of the cases on which the United States relied did not involve the construction of statutory provisions analogous to subsection (f) of the Gonzalez Act and were therefore inapposite. Pet. App. at 7a. This is also true of the cases cited in the Brief for Petitioner. *See generally*, Brief for Petitioner at 18-25.

personal liability for the resulting judgment. The Eleventh Circuit's review of the language and legislative history of the FELRTCA established that the FELRTCA was expressly designed to immunize from personal tort liability those federal employees not already protected by other federal immunity statutes and therefore did not apply to the defendant or other military physicians whose immunity *vel non* from personal tort liability is governed by the Gonzalez Act. *See Newman v. Soballe*, 871 F.2d at 970.

In *Jackson v. Kelly*, 557 F.2d at 735, the United States Court of Appeals for the Tenth Circuit analyzed the express language and legislative history of the Gonzalez Act and concluded that the Gonzalez Act permits suit against an individual military physician where the claimants have no federal tort claim remedy, that the indemnification provision of subsection (f) is premised upon the liability of military medical personnel in the first instance, and that to find otherwise would contravene the language and purpose of subsection (f).[11] The Tenth

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[11] In *Jackson v. Kelly*, 557 F.2d at 735, the Tenth Circuit emphasized that:

> [granting the defendant-physician] official immunity would not only make 10 U.S.C. § 1089(f) superfluous, it would contravene one of Congress' aims in enacting § 1089(f) in its present form. Instead of granting military medical personnel practicing in foreign countries absolute immunity from suit for acts within the scope of their employment, Congress elected to have the government protect them through indemnification or insurance. The effect of this approach rather than absolute immunity is to ensure

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Circuit's analysis appropriately established that Congress did not intend to foreclose the remedies of malpractice victims who have no alternate remedy against the United States, but intended to provide a method for the United States to assume responsibility for damage claims against its military medical personnel arising from medical care rendered within the scope of their employment in foreign countries, to protect military medical personnel from personal liability, and to relieve military medical personnel of the expense of supplying private malpractice insurance while simultaneously preserving a means to compensate victims of their medical negligence. *Id.* at 741, *citing* 1976 U.S. Code Cong. and Admin. News at 4443. *See also Anderson v. O'Donoghue, M.D.*, 677 P.2d at 648.

In *Anderson v. O'Donoghue, M.D.*, 677 P.2d at 648, the defendant was a military physician assigned to a civilian hospital, a non-federal facility within the meaning of subsection (f) of the Gonzalez Act. In a medical malpractice action arising out of his conduct at that hospital, the physician argued that subsection (a) of the Gonzalez Act absolutely immunized him from suit. After analyzing the express language of the Gonzalez Act, particularly the

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> a remedy to victims of malpractice by military medical personnel assigned to a foreign country. If we were to grant official immunity to military medical personnel in foreign countries, then malpractice victims would lose this remedy because the government's responsibility for damage claims under § 1089(f) is premised on the liability of military medical personnel in the first instance.

557 F.2d at 740-1.

relationship between subsections (a) and (f), the Supreme Court of Oklahoma concluded that subsection (f) expressly permits suit to proceed against individual physicians in their personal capacities.

The court reasoned that although subsection (a) provides for an exclusive remedy against the United States, the indemnification provision of subsection (f) "recognizes [that] there is an exception carved from § 1089(a) allowing a party to bring an action against the military physician personally." *Id.* at 651. The court explained that "if this court held that under subsection (a) an action could not be brought personally against the physician where the requirements of subsection (f) are met, the entirety of subsection (f) would be rendered a nullity because there could be no suit against the military physician at all. Statutes must be construed to give meaning to each portion thereof and not so that a statute is rendered superfluous." *Id.* The court therefore concluded that established principles of statutory construction mandated a finding that the physician was subject to suit and entitled to indemnification from personal liability for the resulting judgment pursuant to 10 U.S.C. § 1089(f).

Similarly, in *Pelphrey v. United States*, 674 F.2d at 243, the United States Court of Appeals for the Fourth Circuit analyzed the Gonzalez Act and concluded that military medical personnel acting in foreign countries are subject to personal liability for medical malpractice but may be protected by the Secretary of Defense through indemnification or insurance.[12] *See also Afonso v. City*

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[12] In *Pelphrey v. United States*, the Fourth Circuit articulated:

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of Boston, 587 F. Supp. 1342 (D. Mass. 1984)[13]

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> The statute, as we read it, merely authorizes the Secretary of Defense to provide protection, either through indemnification or insurance, to foreign based military medical personnel who are subject to personal liability (citation omitted). Whereas military medical personnel acting within the United States are immune from personal liability because the [Federal Tort Claims Act] is the exclusive remedy for military medical malpractice arising in the United States, see 10 U.S.C. § 1089(a), military medical personnel acting in a foreign country are personally liable for malpractice because the [Federal Tort Claims Act] does not apply to "any claim arising in a foreign country." Thus, the need for special protection by foreign based medical personnel stems from the very fact that malpractice claims against them are exempt from the [Federal Tort Claims Act].
>
> The legislative history of § 1089(f) supports this interpretation. . . . (citation omitted).

674 F.2d at 246.

[13] In *Afonso v. City of Boston*, 587 F. Supp. at 1342, the United States District Court for the District of Massachusetts analyzed the language and legislative history of the Gonzalez Act and appropriately concluded that a military physician is not entitled to absolute immunity unless a federal tort claim remedy obtains against the United States. *Afonso* was a negligence action against the military physician who treated the civilian plaintiff while in residency training at a private university hospital. The United States subsequently petitioned for removal of the action, for substitution of the United States for the individual defendant pursuant to subsections (a) and (c) of the Gonzalez Act, and for dismissal of the action based on the expiration of the two-year Federal Tort Claims Act statute of limitations. The plaintiff opposed these motions on the

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As such, the holding of the court of appeals is consistent with the express language of the Gonzalez Act, its legislative history, and with the holdings of the majority of courts that have construed the Gonzalez Act.[14]

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ground, *inter alia*, that the physician was entitled to qualified immunity and indemnification pursuant to subsection (f). The issue before the Court in *Afonso* was whether the United States may maintain that a physician is a federal employee for the purpose of converting the action against the individual into an action against the United States while at the same time preserving a defense to the United States' vicarious liability for the acts of the physician. *Id.* at 1344. The court resolved this issue in the negative because, *inter alia*, its review of the Gonzalez Act and the legislative history established the following: 1) that under the circumstances described in subsection (f), a physician "may be within the scope of his military duties *and* acting in a way that would not create vicarious liability for the United States"; 2) that Congress anticipated that an individual military physician would *not* be immune from suit under these circumstances; and 3) that Congress enacted the indemnification provision of subsection (f) to protect the military physician from personal liability in these circumstances. *Id.* at 1345. The court therefore denied the United States' Motions to Substitute and Dismiss and remanded the case to state court pursuant to 10 U.S.C. § 1089(c) for proceedings against the military physician in his individual capacity.

[14] *Cf. Powers v. Schultz*, 821 F.2d 295 (5th Cir. 1987), in which the Fifth Circuit held that subsection (f) indemnification was available only to physicians sued in foreign courts. In *Smith*, the court of appeals distinguished and declined to follow *Powers* on the well-taken ground that neither the language nor legislative history of the Gonzalez Act supports this limitation. Pet. App. at 8a-9a. See S. Rep. 94-1264, *supra*, 1976 U.S. Code Cong. and Admin. News at 4443. The holding in *Powers* is also contrary to the implementing regulation which governs the availability of subsection (f) indemnification. See SECNAV Instruction 6300.3, JA6:14C, Apx. at 1.

B. THE COURT OF APPEALS CORRECTLY HELD THAT THE FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT DOES NOT SUPERCEDE, IMPLIEDLY REPEAL OR AMEND THE GONZALEZ ACT

It is well-settled that the function of this court is to review judgments, not opinions, and that the underlying issue is always whether a legal error resulted in an erroneous judgment. *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). Because the United States has properly conceded that Dr. Marshall is susceptible to suit under the Gonzalez Act, the only issue is whether the court of appeals properly held that the FELRTCA did not "take away" or otherwise circumscribe the Smiths' remedy by suit against Dr. Marshall. Pet. App. at 12a-13a. As set forth *infra*, established principles of statutory construction require the Court to find that the FELRTCA did not amend or repeal the Gonzalez Act and hence that *Smith* was properly decided.

i. The FELRTCA does not expressly repeal or amend the Gonzalez Act.

It is presumed that when Congress intends to amend or repeal a statute, it will expressly do so. *United States v. Hansen*, 772 F.2d 940, 945 (D.C. Cir.), *cert. denied*, 475 U.S. 1045 (1986). That the Gonzalez Act has never been materially amended or expressly repealed necessarily supports the court of appeals' finding that it continues to govern the immunity *vel non* of military physicians for medical negligence committed within the scope of employment.

It is also presumed that Congress legislates with knowledge of existing related statutes and will expressly designate those statutory provisions whose application it wishes to suspend rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction. *Id. See also United States v. Fausto*, 484 U.S. 439 (1988). In this case, the legislative history confirms that Congress knew when it enacted the FELRTCA that the Gonzalez Act governed the immunity *vel non* of military physicians. *See* H. Rep. 100-700, *supra*, 1988 U.S. Code Cong. and Admin. News. at 5948. *See also* discussion at Section B(ii), *infra*. Thus, Congress' failure to expressly suspend any provision of the Gonzalez Act necessarily gives rise to the presumption that Congress did not do so.

In addition, by enacting the FELRTCA as an amendment to the Federal Tort Claims Act, 28 U.S.C. § 2679(b)-(e), the only statute Congress integrated into the FELRTCA's immunizing scheme was the Federal Driver's Act, formerly codified at 28 U.S.C. § 2679(b)-(e), the substantive provisions of which were almost identical to the FELRTCA. That Congress did not amend or integrate the Gonzalez Act in this fashion also supports a finding that the Gonzalez Act continues to govern Dr. Marshall's immunity *vel non* for medical negligence claims arising overseas.

Erroneously, the United States asserts that the FELRTCA's reference to "all federal employees" compelled the court of appeals to find that the FELRTCA absolutely immunizes all federal employees in all circumstances except those expressly enumerated in subsection (b)(2)(B). *See* Brief of Petitioner at 31. This Court has

repeatedly articulated that such all-encompassing statutory language is not to be literally construed. *See, e.g., Briscoe v. LaHue*, 460 U.S. 325 (1983); *Tenney v. Brandhove*, 341 U.S. 367 (1951) ("every person" as used in Civil Rights statute cannot be taken literally); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-688 (1978) ("every contract" as used in Sherman Act cannot be taken literally). To decline to construe such language literally is especially appropriate where, as here, a literal construction would effect an implied repeal of the Gonzalez Act without the requisite clear and convincing evidence that Congress intended to repeal that Act. *See Rodriguez v. United States*, 480 U.S. 522, 524 (1987). *See also* discussion at Section B(ii) *infra*.

Far from evidencing an intent to repeal the Gonzalez Act, the FELRTCA expressly contemplates that it shall not be construed in derogation of other federal statutes which authorize actions against individual federal employees. *See* 28 U.S.C. § 2679(b)(2)(B), Pet. App. at 22a. In particular, subsection (b)(2)(B) (Section 5 of the FELRTCA) states that the exclusive remedy provision on which the United States relies "does not extend or apply to a civil action against an employee of the Government which is brought for a violation of the Constitution of the United States . . . or for a violation of a statute of the United States under which such action against an individual is otherwise authorized." *Id.*

While the United States asserts that the Smiths' Gonzalez Act suit against a military physician is not "brought for a *violation* of a federal statute", the authorities have not construed Section 2679(b)(2)(B) in so restrictive a fashion. *See Washington v. U.S. Postal Service*, 1990 W.L. 36239 (N.D. Ill. 1990); *Saratoga Sav. and Loan*

Ass'n. v. Federal Home Loan Bank of San Francisco, 724 F. Supp. 683 (N.D. Cal. 1989).[15]

More significantly, the legislative history unequivocally confirms that Congress intended for subsection (b)(2)(B) to effectively preserve *all* causes of action arising under federal statutes:

> Section 5 would amend section 2679(b) of title 28 to provide for substitution of the United States as the defendant in cases where the Federal employees [sic] acting in the course and scope of employment. The remedy against the United States would be exclusive, and would preclude any other action or civil suit for money damages from being lodged against the Federal employee or his estate based upon the same conduct. It also would make it clear that the remedy provided in this legislation does not extend to constitutional torts *or to causes of action specifically authorized to be brought against an individual by another statute of the United States.*

H. Rep. 100-700, *supra*, 1988 U.S. Code Cong. & Admin. News at 5952. (emphasis supplied).

Moreover, by enacting the FELRTCA as an amendment to section 2679(b)-(e) of the Federal Tort Claims Act

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[15] In *Washington v. U.S. Postal Service*, 1990 W.L. at 36239, the court held that the FELRTCA does not immunize an individual federal employee from suit under 42 U.S.C. § 1985, a federal statute which provides a remedy for specified conduct (conspiracy to interfere with civil rights) which cannot accurately be described as a "violation" of 42 U.S.C. § 1985. In *Saratoga Sav. and Loan Ass'n v. Federal Home Loan Bank of San Francisco*, 724 F. Supp. at 683, the court held that the FELRTCA does not immunize federal employees from suits which "arise under" the United States Constitution or federal statutes.

(rather than as an amendment to any independently codified immunity statute),

> [Congress intended to] make it clear that the changes made by [the FELRTCA] do not alter either express or implied statutory rights of action for injunctive relief or damages under the usual rules of construction applied by the Supreme Court in such cases as *Cort v. Ash*, 422 U.S. 66 (1975); *Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977); *and Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). Clearly, [the FELRTCA] does not change the law, as interpreted by the courts, with respect to the availability of other recognized causes of action; nor does it either expand or diminish rights established under other federal statutes.

H. Rep. 100-700, *supra*, 1988 U.S. Code Cong. & Admin. News at 5950-51.

In each of the cases cited by Congress in this excerpt from the legislative history, this Court recognized that a right of action may be inferred from a statute which does not expressly create a right of action. *See Cort v. Ash*, 422 U.S. at 66; *Piper v. Chris-Craft Industries*, 430 U.S. at 1; *Transamerica Mortgage Advisors, Inc. v. Lewis*, 44 U.S. at 11. Indeed, each case affirms the well-established principle that a right of action may be inferred in favor of the particular class intended to be protected by the statute where congressional purposes are likely to be undermined absent that inference. *See, e.g. Piper v. Chris-Craft Industries*, 430 U.S. at 25. "The critical inquiry is whether Congress intended to create, either expressly or by implication, a private cause of action". *Id.*

As such, Congress expressly contemplated that subsection (b)(2)(B) of the FELRTCA would permit tort

claimants to sue individual federal employees for causes of action arising expressly *and* by implication from the Gonzalez Act and other federal statutes.[16]

There is therefore no evidence that Congress intended the FELRTCA to replace the existing patchwork system of immunity with a single integrated immunity scheme that would supercede and repeal the Gonzalez Act or the host of other pre-FELRTCA immunity statutes tailored to the concerns of specific branches or functions of government. *See e.g.* 22 U.S.C. § 2702 (1980) (immunity statute covering State Department employees); 38 U.S.C. § 4116 (1965) (immunity statute covering Veterans Administration employees); 42 U.S.C. § 2458a (1976) (immunity statute covering NASA employees); 42 U.S.C. § 233 (1970) (immunity statute covering Public Health Service employees); 10 U.S.C. § 1054 (1986) (immunity statute covering Department of Defense lawyers). Nor is there a single word in the text or legislative history of the

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[16] In this case, application of the factors enunciated in *Cort v. Ash*, 422 U.S. at 66, and subsequent cases easily requires a finding that the Smiths enjoy a right of action against Dr. Marshall pursuant to the Gonzalez Act. Clearly, the Smiths are members of the class of medical negligence victims for whose particular benefit the Gonzalez Act was enacted. The legislative history confirms Congress' intent to create a remedy on their behalf. The statute itself contains language pertinent only to a right of action against a military physician for damages. 10 U.S.C. § 1089(f). The implementing regulation requires the United States to pay the judgment obtained by the Smiths. *See* SECNAV Instruction 6300.3, Apx. at 1. Under these circumstances, a right of action against a military physician for claims arising in a foreign country need not be inferred; it is express and irresistable. *See Cort v. Ash*, 422 U.S. at 82.

Gonzalez Act that purports to withdraw any judicial remedy previously available to medical malpractice claimants like the Smiths. The court of appeals' holding that the FELRTCA does not "take away" the Smiths' Gonzalez Act remedy therefore finds ample support in the express language of the Act.

ii. The FELRTCA does not impliedly repeal or amend the Gonzalez Act

The United States asserts that the FELRTCA, by not expressly permitting the Smiths to pursue their Gonzalez Act remedy, now impliedly precludes them from doing so, and that the court of appeals should have so held.

It is well-settled that this Court may look beyond the express language of a statute to give force to Congressional intent where the statutory language is ambiguous or a literal interpretation would thwart an overall statutory scheme or lead to absurd results. *United States v. Oregon*, 366 U.S. 643, 648 (1961); *United States v. Public Utilities Commission*, 345 U.S. 295, 315 (1953). In this case, the court of appeals properly concluded that the express language and legislative history of the FELRTCA uniformly demonstrate that Congress did not intend to supercede the Gonzalez Act, but intended for the Gonzalez Act to remain an operative part of the integrated statutory scheme enacted by Congress to protect federal employees from personal tort liability. *See* H. Rep. 100-700, *supra*, 1988 U.S. Code Cong. and Admin. News at 5995.

As between the FELRTCA and the Gonzalez Act, only the Gonzalez Act addresses the narrow issue as to the

form of immunity applicable to a military physician with respect to claims arising out of medical negligence committed within the scope of his military medical duties in a foreign country.[17] Established principles of statutory construction dictate that a statute which, like the Gonzalez Act, covers a narrow, precise and specific subject is not submerged by a later-enacted statute covering a more generalized spectrum and that absent a clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.[18] *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). "The issue breaks down to whether a clear intention otherwise can be discovered, whether, in short, it can be fairly concluded that the [later statute] operated as a

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[17] As set forth in the legislative history of the Gonzalez Act, Congress expressly recognized that the Federal Tort Claims Act does not apply to actions arising overseas and designed subsection (f) indemnification to immunize a military physician from personal liability for all claims arising in foreign countries. *See* S. Rep. No. 94-1264, 1976 U.S. Code Cong. and Admin. News 4443, 4451.

[18] In *Morton v. Mancari*, 417 U.S. 535, this Court articulated:

> The reason and philosophy of the rule is that when the mind of a legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter one such a construction, in order that its words shall have any meaning at all.

417 U.S. at 551.

pro tanto repeal of [the earlier one]." *Bradley v. Kissinger*, 418 F. Supp. 64 (D.D.C. 1976). Such an intention on the part of the legislature to repeal must be clear and manifest. *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936). It is not enough to show that the two statutes produce differing results when applied to the same facts for that no more than states the problem; rather, the presumption against the implied repeal of statutes requires the court, when two statutes are capable of co-existence, to regard each as effective. *See Morton v. Mancari*, 417 U.S. at 551; *United States v. Vuitch*, 402 U.S. 62 (1971).

The presumption against implied repeals has been a part of this Court's jurisprudence since at least 1842. *See Wood v. United States*, 41 U.S. (16 Pet.) 342, 362-3 (1845) (Virtual repeals are not favored by courts); *United States v. Tynan*, 78 U.S. (11 Wall.) 88, 92 (1871). As Justice Blackmun observed in his concurring opinion in *United States v. Fausto*,

> [the presumption against implied repeal] is a firmly entrenched part of the legal landscape against which Congress works. We can presume with certainty that Congress is aware of this longstanding presumption and that Congress relies on it in drafting legislation. Necessarily, we must presume that Congress drafted [the Civil Service Reform Act] in the context of our assurances that the Act's language would not lightly be found to repeal existing statutes . . . If we construe a statute in a different legal environment than that in which Congress operated when it drafted and enacted the statute, we significantly increase the risk that we will reach an erroneous interpretation. This danger further enhances the need for us to be faithful to our

484 U.S. at 463.

> duty to read statutes consistently whenever possible and to find repeals by implication only when differences between the earlier and later enactments are irreconcilable.

Id. at 850, n. 9.

> Accordingly, to find an implied repeal,
>
> [t]here must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy . . . It must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be.

Chew Heong v. United States, 112 U.S. 536 (1884), *quoting Wood v. United States*, 41 U.S. (16 Pet.) at 342 and *State of South Carolina v. Stoll*, 84 U.S. (17 Wall.) 425 (1873).

In this case, the legislative history demonstrates that Congress enacted the FELRTCA to address the "dramatic change" in common law principles of immunity that resulted from the decision of this Court in *Westfall v. Erwin*, 484 U.S. 292 (1988)[19]; the single "functional effect"

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[19] Congress believed that federal employees prior to *Westfall* were absolutely immune from personal tort liability arising out of activities within the scope of employment under the principles enunciated in *Barr v. Matteo*, 360 U.S. 564 (1959). *See* H. Rep. 100-700, *supra*, 1988 U.S. Code Cong. and Admin. News at 5946. In Congress' view, the Supreme Court in *Westfall* "added an additional requirement for immunity when a federal employee is sued in his personal capacity . . . the Federal

(Continued on following page)

of the FELRTCA was to return federal employees affected by the *Westfall* decision to the status they held prior to the *Westfall* decision.[20] *See* H. Rep. 100-700, *supra*, 1988 U.S. Code Cong. and Admin. News at 5945, 5947.

(Continued from previous page)

employee not only must have been acting within the scope of employment (the original standard) but must also have exercised governmental discretion in acting." *Id.* Congress feared that whether an employee was exercising governmental discretion was a fact-based determination that could not be summarily resolved and would therefore give rise to substantial litigation expenses and potentially to personal liability for torts arising out of non-discretionary functions. *Id.*

[20] Accordingly, the stated purpose of the FELRTCA is "to protect federal employees from personal liability for *common law* torts committed within the scope of employment while providing persons injured by the *common law* torts of federal employees with an appropriate remedy against the United States". *See* 28 U.S.C. § 2679 (b). Thus, Congress intended that "the availability of suit under the Federal Tort Claims Act precludes any other civil action or proceeding from being brought against an individual Federal employee or his estate if *such action or proceeding would sound in common law tort*" and that the United States "will incur vicarious liability *only for the common law torts* of its employees which are committed within the scope of their employment". *See* H. Rep. 100-700, *supra*, 1988 U.S. Code Cong. & Admin. News at 5949 (emphasis supplied). The legislative history defines "common law torts" as *state* law causes of action predicated on the common or case law of the various states and traditional tort causes of action codified in *state* statutes that permit recovery for acts of negligence. *Id.* at 5950 (emphasis supplied).

In this case, the established principle that liability for negligence is determined according to the substantive law of the place where the negligence occurred may mandate a finding that the substantive law of Italy, not the [American] common law of tort, will govern this action. *See* Federal Rule of

(Continued on following page)

As set forth in the legislative history, Congress recognized that military physicians and other specific classes of federal employees were already protected by federal immunity statutes and were therefore not among those federal employees affected by the *Westfall* decision or the FELRTCA. *Id.* at 5948. Indeed, Congress envisioned that the *Westfall* decision would most severely affect lower-level clerical and other governmental employees whose torts were unlikely to involve the exercise of governmental discretion and who, because of their low-level positions, were unlikely to be insulated from the *Westfall* decision by pre-existing statutory immunities. *Id.* at 5946. Far from evidencing an intent to modify such pre-existing immunity statutes, Congress endorsed them as "substantial precedent" for the statutory immunities the FELRTCA would confer on the remainder of the federal workforce, stating:

> There is substantial precedent for providing an exclusive remedy against the United States for the actions of Federal employees. Such an exclusive remedy has already been enacted to cover the activities of certain Federal employees, including:
>
> * * *
>
> Medical Personnel. – The [Federal Tort Claims Act] is the exclusive remedy for medical

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Civil Procedure 44.1, which empowers the federal court to determine and apply the law of Italy or any other foreign country. *See also Rayonier, Incorporated v. United States*, 352 U.S. 315 (1957). That the instant suit is based on a federal statute, not on the common law, also demonstrates that this is not a common law tort action within the ambit of the FELRTCA.

> or dental malpractice on the part of the medical personnel of most Federal agencies. (See, e.g., 10 U.S.C. § 1089 regarding Department of Defense medical personnel; 22 U.S.C. 2458a regarding NASA medical personnel; 38 U.S.C. 4116 regarding Veterans Administration medical personnel; 22 U.S.C. § 2702 regarding State Department physicians; and 42 U.S.C. 233 regarding Public Health Service physicians).
>
> Military and Civilian Lawyers of the Department of Defense. – The [Federal Tort Claims Act] is the exclusive remedy for a claim arising out of legal assistance provided by legal staff within the Department of Defense. (10 U.S.C. § 1054)

Id. at 5948.

Thus, the legislative history unequivocally establishes that the FELRTCA was intended to apply to all federal employees whose tort immunity *vel non* had been governed by the common law and was not intended to affect employees already insulated from *Westfall* by pre-existing immunity statutes such as the Gonzalez Act. Because the Gonzalez Act and the FELTRCA are easily reconciled and indeed were intended to peacefully co-exist in this fashion,[21] the court of appeals correctly held

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[21] The statutes can also be reconciled by understanding that there are circumstances outside the ambit of the Gonzalez Act in which the FELTRCA may govern Dr. Marshall's immunity *vel non* for tort liability. By its terms, the Gonzalez Act applies only to torts committed "in the performance of medical, dental or related health care functions" within the scope of the military medical duties. 10 U.S.C. § 1089(a), Pet. App. at 28a. A military physician who commits a tort while engaged in

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that the Gonzalez Act was not superceded by the FELTRCA.

That Congress did *not* intend the 1988 enactment of the FELRTCA to impliedly repeal pre-existing immunity statutes is further demonstrated by its 1988 amendment of the Veterans Administration Medical Malpractice Immunity Act, 38 U.S.C. § 4116[22] to state that "the exception [to the United States' liability under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)] provided in section 2680(h) of title 28 [retaining the United States' sovereign immunity for assault and battery] shall not apply" to claims arising under that Act. If Congress had enacted the FELRTCA to repeal pre-existing immunity statutes, it

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non-medical functions (for example, while driving to a rifle range for weapons training or while attending classes on military justice) may well be among those federal employees whose tort immunity *vel non* is governed by the FELRTCA.

[22] Significantly, the Gonzalez Act was patterned after and is substantially similar to 38 U.S.C. § 4116, which Congress enacted in 1965 to immunize Veterans Administration employees from personal liability for medical malpractice judgments and to compensate malpractice victims. *See* 38 U.S.C. § 4116. In addition to having identical purposes, each act contains an almost identical opening subsection in which the Federal Tort Claims Act is made the "exclusive remedy" for specific torts. *See* 10 U.S.C. § 1089(a) and 38 U.S.C. § 4116(a). Each act also contains a subsection which, in almost identical terms, permits suit against an individual physician for medical negligence arising in a foreign country and provides that the physician shall be indemnified for any judgment rendered against him in that action. *See* 10 U.S.C. § 1089(f) and 38 U.S.C. § 4116(e).

surely would not have concurrently amended the Veterans Administration Medical Malpractice Immunity Act to provide a more comprehensive remedy to victims of medical negligence. To the contrary, the 1988 amendment of the latter statute to provide a remedy for assault and battery,[23] a cause of action likely to arise out of a physician's failure to obtain a patient's with informed consent, clearly evidences Congress' continuing intention to tailor immunity statutes to the particular functions of specific federal employees and to compensate the victims of their negligence.

Disingenuously, the United States asserts that its construction of the statutes at issue does not impliedly repeal the Gonzalez Act because that Act remains in force for the purpose of indemnifying physicians from judgments entered in foreign courts and has been repealed or amended *only* to the extent that subsection (f) formerly permitted medical malpractice claimants to sue military physicians in American courts for medical negligence occurring overseas. Brief for Petitioner at 33-4. Clearly, the presumption against implied repeals extends to the implied amendment of any statutory provision, precluding that inference where, as here, there is no express statutory language or legislative history to support it. *See United States v. Welden*, 377 U.S. 95 (1964). *See also* 2A Sands, Sutherland Statutory Construction at § 22.30. The assertion that the Gonzalez Act has been repealed only to the extent it formerly provided a remedy to the Smiths is

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[23] The Gonzalez Act so provides at 10 U.S.C. § 1089(e).

a transparent, self-serving attempt to argue the construction most expedient at the moment and therefore represents precisely the mischief that the presumption against implied repeal was intended to prevent.[24]

Equally erroneously, the United States asserts that the presumption against implied repeal is inapplicable because the Gonzalez Act did not "create" a cause of action against Dr. Marshall. Whether such a cause of action was "created" is a semantic question with no bearing on the issue of implied repeal. Where, as here, it is undisputed that Congress has devised a comprehensive system to award payments for injuries arising out of military medical negligence committed abroad, a court may not adjudicate exceptions to that system absent specific legislation to that express effect. *See Johansen v. United States*, 343 U.S. 427, 441 (1952).

Because there is no evidence that Congress intended to alter the compensation system set forth in the Gonzalez Act or the implementing regulation, the court of appeals was duty-bound to incorporate this method of compensation as fairly and intelligently as possible into the entire statutory scheme, not to find that it has been impliedly superceded or repealed. *Id.*

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[24] The assertion is also inconsistent with the United States' concession that the Gonzalez Act makes subsection (f) indemnification available to a military physician sued for medical negligence claims arising in foreign countries without regard to where the action is ultimately maintained. *See* Pet. App. at 6a.

iii. The court of appeals' holding is consistent with the only other case authority addressing the relationship between the Gonzalez Act and FELRTCA

Of all discovered cases involving the FELRTCA, only one case (in addition to *Smith*) has addressed whether the FELRTCA supercedes or impliedly repeals other federal immunity statutes. *See Newman v. Soballe*, 871 F.2d at 969. In *Newman*, as in *Smith*, the issue was whether the FELRTCA superceded the Gonzalez Act with respect to claims arising out of medical negligence committed in a foreign country. Based on its review of the language and legislative history of the Gonzalez Act and the FELRTCA, the United States Court of Appeals for the Eleventh Circuit unequivocally held that the Gonzalez Act continues to define the scope of a military physician's immunity for medical negligence committed within the scope of his official duties in a foreign country. The court explained:

> [The FELRTCA], the new amendment to the [Federal Tort Claims Act], enacted after the Complaint in this case was filed, provides that whenever an individual United States employee is sued in common law tort for acts committed within the scope of employment, the exclusive remedy is against the United States. *See* Federal Employees Liability Reform & Tort Compensation Act of 1988, 1988 Amendment to 28 U.S.C. § 2679. This amendment, enacted to negate the recent Supreme Court decision of *Westfall v. Erwin*, 484 U.S. 292, 108 S. Ct. 580, 98 L.Ed.2d 619 (1988), *is expressly designed to immunize from personal tort liability those federal employees not protected by other immunity statutes. See* H. Rep. 100-700, 100th Cong. 2d Sess. 2, 1988 U.S. Code Cong. & Admin. News at 5945.

> *As a military physician, the [defendant-physician] is specifically protected by the Gonzalez Act and is therefore not among those federal employees affected by the Westfall decision or the amendment.* Cf. H. Rep. 100-700, 100th Cong. 2d Sess. 4, 7, U.S. Code Cong. & Admin. News 1988, pp. 5947, 5950. *More importantly, the amendment is part of the [Federal Tort Claims Act] and only applies in situations where the [Federal Tort Claims Act] itself would apply.* The new amendment and subsection 2680(k) are both part of the same chapter of the [Federal Tort Claims Act], chapter 171. *Subsection 2680(k) expressly holds that the provisions of chapter 171 shall not apply to claims arising in a foreign country. Because the Newmans' claim arises in a foreign country, the new amendment does not apply to this case and we must look to the Gonzalez Act to resolve this case.*

Id. at 971 (emphasis supplied).

As such, the holding of the court of appeals in *Smith* is consistent with the only other authority to have addressed the relationship between the FELRTCA and the Gonzalez Act.

iv. The court of appeals' holding accords with the manifest purposes of the Gonzalez Act and the FELRTCA.

Erroneously, the United States asserts that the holding in *Smith* undermines the purpose of the FELRTCA, particularly Congress' desire to immunize federal employees without regard to whether an alternative remedy obtains against the United States, by permitting a tort claimant to maintain an action against the federal employee responsible for the tort whenever a Section

2680 exception precludes a federal tort claim remedy against the United States. Brief of Petitioner at 18.

This argument is predicated upon a fundamental misstatement of the reasoning behind the court of appeals' holding in *Smith*. Irrefutably, the court of appeals did *not* decline to apply the FELRTCA simply because the foreign country exception precludes a remedy against the United States. Instead, the court of appeals held that the FELRTCA is inapplicable because a more specific federal immunity statute designed to apply in precisely this circumstance expressly makes Dr. Marshall susceptible to suit for claims arising in "a foreign country . . . or if the circumstances are such as are likely to preclude the remedies of third persons against the United States."[25] 10 U.S.C. § 1089(f). Next, the court of appeals reasoned that the FELRTCA did not alter this immunizing scheme by permitting a remedy to obtain against the United States for tort claims arising in a

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[25] The "circumstances precluding" language of subsection (f) and its legislative history strongly suggest that Congress appreciated the enormous gravity of the harm likely to arise out of medical malpractice and did not intend to foreclose the remedies of medical malpractice victims under any circumstances. Although the court of appeals did not rely on this provision (relying instead on the provision for "claims arising in a foreign country"), the provision is additional support for the court of appeals' holding. *See* 10 U.S.C. § 1089(f).

Even if the court of appeals had relied on the "circumstances precluding" language of subsection (f), its holding would necessarily have permitted only medical malpractice claimants to sue military physicians within the ambit of the Gonzalez Act and would not have diminished the immunities of any federal employee within the ambit of the FELRTCA.

foreign country and therefore did not "take away" the Smiths' Gonzalez Act remedy or otherwise apply to this case.

Making this express, narrowly-drawn Gonzalez Act remedy available to the Smiths does not provide a precedent for non-medical malpractice claimants to sue individual federal employees, nor does it otherwise threaten the structural integrity of the FELRTCA.

Where, as here, the court of appeals' judgment was predicated upon a proper finding that the FELTRCA does not supercede the Gonzalez Act, this Court may not overturn that judgment on the basis of a mere challenge to the manner in which the opinion was expressed. *See e.g., Chevron, USA v. Natural Resources Defense Council,* 467 U.S. at 842.

Throughout this litigation, the United States has disparaged the significance of the immunity from personal liability which the Gonzalez Act accords Dr. Marshall. To understand that Congress' desire to immunize federal employees from personal tort liability is well-served by subsection (f) indemnification, one need only appreciate that subsection (b)(2)(B) of the FELRTCA permits plaintiffs to sue federal employees for violations of the Constitution or federal statutes and provides no indemnification or other form of immunity from personal liability to employees sued in those circumstances. Far from frustrating the purpose of the FELRTCA, the holding of the court of appeals accords with the purpose of each statute by permitting the Smiths to maintain an action against Dr. Marshall and by immunizing him from personal liability for the resulting judgment.

The only result that would frustrate Congress' intent is the one advocated by the United States. If the United States were to prevail, the parents of a helpless tort victim, now eight years old and without cognitive life, will never receive compensation that would at least address the enormous cost of caring for their brain-devastated child, and a military physician will avoid a judgment which the Gonzalez Act and the implementing regulation require the United States to pay. The legislative history of each statute at issue establishes that Congress did not intend this unconscionable result, that Congress enacted the Gonzalez Act to provide the Smiths a remedy for their son's tragic injury, and that Congress did not enact the FELRTCA to take that remedy away.

CONCLUSION

For the aforestated reasons, Respondents Marcus, Hildegard and Dominique Smith respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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DEPARTMENT OF THE NAVY
Office of the Secretary
Washington, D.C. 20350

SECNAVINST 6300.3
JAG: 14C
14 March 1978

SECNAV INSTRUCTION 6300.3

From: Secretary of the Navy

To: All Ships and Stations

Subj: Medical Malpractice Claims Against Military and Civilian Personnel of the Armed Forces

Ref: (a) DOD Directive 6000.6 of 24 August 1977

(b) Public Law 94-464. § 1(a). 90 Stat. 1985, Title 10, United States Code. Section 1089

(c) Title 10, United States Code, Section 2733, Military Claims Act

(d) Title 28, United States Code, Section 1346(b)

1. **Purpose.** This instruction implements reference (a) by assigning responsibility for administering the provisions of reference (b) to the Judge Advocate General.

2. **Background.** Prior to enactment of reference (b), some health-care officials were immune from suit by the legal doctrine of official immunity; however, the outcome of any judicial decision on a particular fact situation could not be predicted with any certainty. The intent of the Congress in passing reference (b) was to insulate all Department of Defense, Coast Guard, and Central Intelligence Agency medical personnel from the expense of defending malpractice suits and the cost of paying judgments or settlements in such suits.

3. **Effective date.** Reference (b) pertains only to those claims accruing on or after 8 October 1976.

4. **Persons Covered.** All physicians, dentists, nurses, pharmacists, paramedical or other supporting personnel, including medical and dental technicians, nursing assistants, and therapists of the Armed Forces, the Department of Defense, or the Central Intelligence Agency performing medical, dental, or related health-care functions (including clinical studies and investigations) are covered so long as the alleged malpractice occurred while acting in the scope of duties or employment.

5. **Scope of Employment.** All officially assigned duties are considered to be in the scope of employment. This includes, among other things, health care performed by Navy personnel assigned to a civilian hospital, and health care performed by civilians training with or otherwise assigned to the Navy. Scope of employment does not include employment of Navy personnel at civilian health care facilities during nonduty hours ("moonlighting").

6. **Extent of Protection.** Reference (b) extends coverage within the United States and its possessions by making suit against the United States under the Federal Tort Claims Act the exclusive remedy for an injured party. Where the Federal Tort Claims Act does not apply (as, for example, where the acts giving rise to the claim occurred outside the United States), coverage is provided by allowing the Secretary of Defense to hold harmless or provide liability insurance for health care personnel.

7. **Exercise of Authority.** By reference (a), the Secretary of Defense delegated to the Secretary of the Navy the authority to hold harmless or provide liability insurance

for Navy health care personnel. All persons referred to in paragraph 4 above and in subsection (a) of reference (b) are hereby held harmless for damages resulting from negligent or wrongful acts or omissions while acting within the scope of duties and assigned to duty in a foreign country, or detailed for service with other than a Federal agency, or if the circumstances are such as are likely to preclude remedy against the United States under the Federal Tort Claims Act, as provided by subsection (f) of reference (b).

8. **Action**

(a) By the defendant. Health care personnel of the Department of the Navy who are sued for Navy-related activities shall immediately deliver all process and pleadings served upon them (or an attested true copy thereof) to the commander of the naval installation where they were attached at the time of the incident giving rise to the suit.

(b) By a commanding officer

(1) Upon receipt of process and pleadings as provided above, the commanding officer shall promptly furnish copies to the appropriate United States Attorney, to the Attorney General, and to the Secretary of the Navy (Judge Advocate General).

(2) Upon receipt of process or pleadings, or upon notice of any claim or potential claim, an investigation conforming to Chapter XX, JAG Manual, shall be conducted promptly and the commanding officer shall report in the endorsement whether or not the acts giving rise to

the claim were performed in the scope of official duties or employment.

(3) Upon learning that a claim or lawsuit has been filed, the Judge Advocate General (Code 14C) shall be notified immediately by message or telephone. If no investigation was conducted, such will be expedited. Certified copies of all claims, service of process, and pertinent papers shall be forwarded by ordinary mail to the Judge Advocate General (Code 14C) and to the Officer in Charge of the nearest Naval Legal Service Office.

(c) By the Judge Advocate General. The Judge Advocate General may redelegate authority and assign tasks to appropriate naval commands to ensure the following:

(1) The Judge Advocate General shall maintain liaison with the Attorney General and the appropriate United States Attorney.

(2) The Judge Advocate General shall provide the Attorney General adequate information upon which to base the scope-of-employment determinations required by reference (b).

(3) The Judge Advocate General shall monitor each case to ensure that, whenever appropriate, such cases shall be transferred to the appropriate U.S. District Court and deemed a tort case against the United States.

(4) The Judge Advocate General shall arrange through the Department of Justice to defend actions brought against Navy health care personnel for acts performed in the scope of their duties or employment. The procedures of the Military Claims Act (10 U.S.C. § 2733)

shall be used to determine costs, settlements, or judgments against such individuals.

W. GRAHAM CLAYTOR, JR.
Secretary of the Navy

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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MARCUS S. SMITH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1646

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MARCUS S. SMITH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

1. Respondents do not defend the rationale on which the court of appeals relied in holding the Reform Act inapplicable to this case. Noting that respondents "have no remedy against the United States" by virtue of the foreign tort exception to the Federal Tort Claims Act, the Ninth Circuit ruled that "[b]ecause they do not, [the Reform Act] does not operate to provide Dr. Marshall with immunity." Pet. App. 11a. Evidently recognizing that this reasoning is untenable, respondents suggest that the court "did *not* decline to apply [the Reform Act] simply because the foreign country exception pre-

cludes a remedy against the United States." Resp. Br. 45.[1] They argue for affirmance of the court's judgment exclusively on the ground that the Gonzalez Act forecloses application of the Reform Act to this case.

As we demonstrated in our opening brief (U.S. Br. 11-30), the Ninth Circuit's interpretation of the Reform Act contradicts the statute's language, legislative history, and stated purpose. It was clearly Congress's intention to prohibit—with the exception of actions for violation of the Constitution or a federal statute—all suits against federal employees based on

[1] In respondents' view, the court of appeals "held that [the Reform Act] does not 'take away' [respondents'] cause of action against Dr. Marshall or otherwise bar medical malpractice claims cognizable under the Gonzalez Act." Resp. Br. 5; see, *e.g.*, *id.* at 6 (court's ruling was "based on * * * the Gonzalez Act"); *id.* at 8 (court held that the Reform Act did not "supercede or take away [respondents'] Gonzalez Act remedy"); *id.* at 27 (same); *id.* at 33 (same); *id.* at 45.

The court of appeals' opinion does not sustain respondents' reading; in rejecting the government's reliance on the Reform Act, the court of appeals construed that statute on its own terms, without regard to the Gonzalez Act. Pet. App. 11a-12a. The opinion nowhere discusses the issue that respondents suggest was the subject of the court's holding—*i.e.*, the question whether the Reform Act "take[s] away" respondents' "Gonzalez Act remedy" (Resp. Br. 8, 27, 33). The phrase "Gonzalez Act remedy" does not appear in the opinion. The sentence on which respondents rely reads, referring to the legislative history of the Reform Act, "These legislative statements support our conclusion that [the Reform Act] did not take away [respondents'] cause of action against Dr. Marshall." Pet. App. 12a. The "cause of action" referred to is respondents' malpractice claim based on state or Italian law.

Plainly, the court's reasoning with respect to the Reform Act would be equally applicable to a claim that a federal employee's negligence caused an automobile accident overseas.

torts committed within the scope of their employment, including those suits in which an FTCA exception would bar an action against the United States. Consequently, this Court should hold that the Reform Act is fully applicable to claims that fall within exceptions to the FTCA.

2. Respondents argue that the Gonzalez Act requires a different result when a military physician is sued for malpractice committed abroad. Although the court of appeals did not address that issue (see note 1, *supra*), we agree that it is ripe for decision if the Court is inclined to reach it.[2] We stress at the outset, however, the precise extent of our disagreement with respondents' position. In the court of appeals, the government withdrew its contention that the Gonzalez Act itself required substitution of the United States as the defendant in the action. See U.S. Br. 5 & nn.2-3. Nevertheless, the court of appeals addressed that issue and decided it in respondents' favor. Pet. App. 2a-9a. The petition for certiorari did not seek further review of that aspect of the court of appeals' decision, and we do not argue here that the Gonzalez Act requires the substitution of the United States as the defendant in this action.[3]

[2] See *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 382 (6th ed. 1986).

[3] We note, however, that the question whether the Gonzalez Act barred an action against Dr. Marshall was not beyond debate. One court of appeals held that the Act did foreclose actions against military physicians in cases of this type, *Powers* v. *Schultz*, 821 F.2d 295 (5th Cir. 1987), and the House committee report accompanying the Reform Act cited *Powers* for the proposition that the Reform Act would preclude actions against federal employees when an FTCA exception barred an action against the United States. See U.S. Br. 36 n.21.

Where we part company with respondents is over the question whether the Gonzalez Act justifies a refusal to substitute the United States as the defendant *under the Reform Act*. There is no dispute—and the Attorney General's designate has certified—that respondents' claims are based upon "personal injury" arising from the allegedly "negligent or wrongful act or omission of [an] employee of the Government while acting within the scope of his office or employment" (28 U.S.C. 2679(b)(1)). Thus, under the Reform Act, an FTCA action against the United States is the exclusive remedy for those claims (*ibid.*); the United States must be substituted as the defendant (28 U.S.C. 2679(d)(1)); and the action is subject to the foreign tort exception (28 U.S.C. 2679(d)(4)).

The Gonzalez Act does not mandate a different result. First, the Gonzalez Act does not give rise to a claim of the type that either of the express exceptions to the Reform Act allows to be brought against a federal employee. Second, the Gonzalez Act lends no support to an implied exception to the Reform Act —under the presumption against implied repeals or any other principle of statutory construction.

a. In arguing that their claim falls within an express exception to the Reform Act (Resp. Br. 29-33), respondents fail totally to come to terms with the language of those exceptions. Respondents appear to read the Reform Act as saying that it is not to be "construed in derogation of other federal statutes which authorize actions against individual federal employees" (*id.* at 29). But the Act says no such thing. It makes clear that the exceptions apply *only* to actions "brought for a violation" of the Constitution or a federal statute. 28 U.S.C. 2679(b)(2)(A)-(B). Respondents cannot—and do not—contend that

their action has been brought for "*a violation of*" the Gonzalez Act or any other federal statute.[4]

The legislative history of the Reform Act is fully consistent with the precisely drafted language of those exceptions. Compare Resp. Br. 29-32. The House committee report, relied upon by respondents at several points (*id.* at 28, 30, 33, 36-37 & n.19), states that the exception for federal statutory claims was designed to preserve

> express or implied statutory rights of action for injunctive relief or damages under the usual rules of construction applied by [this] Court in such cases as: *Cort* v. *Ash*, 422 U.S. 66 (1975); *Piper* v. *Chris-Craft Industries*, 430 U.S. 1 (1977); and *Transamerica Mortgage Advisors Inc.* v. *Lewis*, 444 U.S. 11 (1979).

H.R. Rep. No. 700, 100th Cong., 2d Sess. 7 (1988).

The language of the Reform Act accurately describes the "express or implied statutory rights of

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[4] Discussions of the Reform Act in two cases cited by respondents (Resp. Br. 29-30)—*Washington* v. *United States Postal Service*, No. 87 C 5782 (N.D. Ill. Mar. 6, 1990), and *Saratoga Savings & Loan Ass'n* v. *Federal Home Loan Bank*, 724 F. Supp. 683 (N.D. Cal. 1989)—do not suggest otherwise. In *Washington*, the plaintiff sought relief under 42 U.S.C. 1985(2), alleging that the defendants had retaliated against her for pursuing civil rights claims. That action can fairly be characterized as one based upon a violation of a federal statute that prohibits conspiracies to engage in retaliation of that type. In *Saratoga*, the court dismissed claims based upon violations of the Due Process Clause, First Amendment, the federal conflict of interest statute, and the National Housing Act. 724 F. Supp. at 689-690. In a brief aside, the court noted that the Reform Act would not have required substitution of the United States as the defendant with respect to these claims. *Id.* at 689 n.6. Nothing in these cases remotely suggests that the Reform Act exempts any actions against federal employees that are not based on a violation of federal law.

action" referred to in the cited cases. Those cases involved claims that defendants had violated federal statutes, and the issue was whether those statutes could be interpreted to authorize remedies in favor of private parties for the violations. Respondents' reliance on the Gonzalez Act cannot be brought within this framework, as their own strained attempt to invoke *Cort* v. *Ash*, 422 U.S. 66 (1975), demonstrates. See Resp. Br. 32 & n.16. It is impossible to find in the Gonzalez Act—a statute that creates no duties running from military physicians to their patients and provides no remedy to patients—an intention to provide a federal right of action in favor of respondents.

Nor do the only two references to the Gonzalez Act in the House committee report furnish any support for respondent's position. First, the report indicates that the Gonzalez Act was one of several statutes viewed as "substantial precedent" for the Reform Act. H.R. Rep. No. 700, *supra*, at 4. Second, the report cites *Powers* v. *Schultz*, 821 F.2d 295 (5th Cir. 1987), as one of several examples of how the Reform Act would bar claims falling within exceptions to the Federal Tort Claims Act. See note 3, *supra*. Even if there were an ambiguity in the language of the statute (and there is not), these references would not support recognition of an exception to the Reform Act for individuals encompassed by the Gonzalez Act. Rather, they suggest an intention to draw on the precedent of earlier immunity statutes in fashioning a broad provision conferring an equal measure of protection on all federal employees from all tort claims not based upon a violation of federal law. The purpose of the Reform Act is to "substitute the

United States as the solely permissible defendant in *all common law tort actions against Federal employees*," H.R. Rep. No. 700, *supra*, at 6 (emphasis added); see *id.* at 2, 4, 8-9, not to add another element to what respondents aptly describe as the preexisting "patchwork system of immunity" (Resp. Br. 32).

In short, respondents seriously misstate our argument as asserting that the Reform Act "by not expressly permitting [them] to pursue their Gonzalez Act remedy, now impliedly precludes them from doing so." Resp. Br. 33. Subject to the Reform Act's two stated exceptions, the Act *expressly* makes an action under the Federal Tort Claims Act for torts committed by "any employee of the Government" acting within the scope of employment exclusive of "any other civil action or proceeding for money damages." 28 U.S.C. 2679(b)(1)-(2). This language is not "ambiguous," nor would "a literal interpretation * * * thwart an overall statutory scheme or lead to absurd results" (Resp. Br. 33). As we demonstrated in our opening brief, our interpretation of the Reform Act is consistent with the findings and statement of purpose enacted as part of the statute, as well as with its legislative history. U.S. Br. 24-30.

b. Because respondents cannot bring their action within one of the express exceptions to the Reform Act, they bear the very heavy burden of establishing an additional, implied exception for their claims. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980). In seek-

ing to sustain that burden, respondents rely primarily on the canon of statutory construction that implied repeals of statutes are not favored. See Resp. Br. 33-44. But the presumption against implied repeals is inapplicable here, and, even if it were applicable, it would not justify denying effect to the unambiguous language of the Reform Act.

i. Respondents' implied-repeal argument is built upon a fundamental mischaracterization of the Gonzalez Act. Throughout their brief, respondents assert that the Gonzalez Act gives rise to a federal cause of action against Dr. Marshall. We are told, for instance, that respondents are pursuing a "Gonzalez Act remedy" (Resp. Br. 8, 33, 46); that "the instant suit is based on a federal statute" (*id.* at 38 n.20); that the Gonzalez Act "governs the liability *vel non* of military physicians for torts committed within the scope of their military medical duties overseas" (*id.* at 2, 6); that respondents' claims are "cognizable under the Gonzalez Act" (*id.* at 5); that claims against military physicians based upon alleged malpractice abroad are "causes of action arising expressly *and* by implication from the Gonzalez Act" (*id.* at 32; see *id.* at 30 & n.15); and that military medical personnel are "susceptible to suit under the Gonzalez Act" for malpractice abroad (*id.* at 9, 13). Not content with arguing that position, respondents even assert that the government has "conced[ed] that the Gonzalez Act authorizes suit against Dr. Marshall" and that the court of appeals adopted their view of the Gonzalez Act. *Id.* at 3-4, 5, 10; see, *e.g.*, *id.* at 6, 9, 10, 13 (attributing respondents' position to the court of appeals).

These assertions are all wide of the mark, and they gain no substance through repetition. As demonstrated in our opening brief (U.S. Br. 32-33), the Gonzalez Act does not furnish respondents with any right of action against Dr. Marshall. The Act does not impose any duty on military physicians or confer any remedy on injured parties. The most that can be said is that in some cases the Gonzalez Act does not bar suit against a military physician and that the Act authorizes officials to indemnify military medical personnel against unfavorable judgments.[5] Any claim that respondents may have against Dr. Marshall is based exclusively on some other source of law.[6]

[5] The legislative history of the Gonzalez Act does not suggest that its purpose was to enhance the remedies available to injured plaintiffs. The purpose of the bill as a whole was described as being "to provide, through application of the Federal Tort Claims Act, protection from individual liability to certain medical personnel while acting within the scope of their official duties." S. Rep. No. 1264, 94th Cong., 2d Sess. 1 (1976). Moreover, the Senate report did not suggest that the authority to indemnify military physicians was motivated by a desire to provide a remedy to injured parties. The purpose of Section 1089(f), it stated, was "to avoid liability being assessed against an individual medical personnel in a situation where the Federal Tort Claims Act would not be applicable." S. Rep. No. 1264, *supra*, at 10.

[6] Respondents also overstate the extent to which the Gonzalez Act itself confers protection on military physicians sued for malpractice abroad. The Act does not "entitle" Dr. Marshall to indemnity, and the court of appeals did not so hold. Compare Resp. Br. 4, 5, 10, 13, 20-21. Rather, 10 U.S.C. 1089(f) provides that the relevant agency head "may, to the extent that the head of the agency * * * considers appropriate, hold harmless or provide liability insurance" for such physicians. As the regulation cited by respondent reflects (Resp. Br. 13), the Department of Defense has adopted a policy of indemnifying its physicians. That regulation represents an exercise of the authority conferred by the Gonzalez Act, not an interpretation of any statutory requirement. Compare, *e.g.*, *id.* at 12-13.

The Gonzalez Act's precise effect on the parties' rights and duties is not, as respondents suggest, a "semantic question with no bearing on the issue of implied repeal" (Resp. Br. 42). A proper understanding of the Gonzalez Act's legal effect determines whether there has been any "repeal," in whole or in part, that could trigger the presumption against implied repeal in the first place. To illustrate the point, it is helpful to consider the case that would arise if a State (or foreign country) passed a statute capping medical malpractice awards—or, for that matter, abolishing them altogether. Such a statute could have no effect on federal law; it could not repeal any "Gonzalez Act remedy" (*id.* at 8, 33, 46), if there were one against an individual. It is clear, however, that the Gonzalez Act would not render such a statute unenforceable as applied to military medical personnel. The reason is obvious. The Gonzalez Act confers no right on a plaintiff to recover for medical malpractice. Thus, there is no inconsistency between that Act and a statute that limits or abolishes malpractice claims, and no reason to consider whether, and to what extent, such a statute could lawfully "repeal" the Gonzalez Act.

The same analysis controls this case. There is no more inconsistency between the Gonzalez Act and the Reform Act than there would be between the Gonzalez Act and a non-federal statute that effectively abolished respondents' claims. To be sure, the Reform Act reduces (but does not eliminate) the occasions on which the Defense Department may be called upon to indemnify a physician who has been held liable under some other law. But that kind of effect does not trigger the presumption against implied repeals.

In this respect, this case is quite similar to *United States* v. *Fausto*, 484 U.S. 439 (1988). In *Fausto*, the question was whether the Civil Service Reform Act of 1978 precludes a federal employee from suing in the Claims Court under the Back Pay Act to obtain judicial review of an allegedly unlawful termination. The Court held that the CSRA forecloses such judicial review, even though review could have been obtained in the Court of Claims (the predecessor of the Claims Court) prior to the passage of that Act. The Court rejected a contention that this result would violate the presumption against implied repeals, explaining that the presumption does not apply to the "repeal by implication of a legal disposition implied by a statutory text" and that the Back Pay Act would "remain[] an operative part of the integrated statutory scheme set up by Congress to protect civil servants." 484 U.S. at 453.[7]

Similar reasoning governs this case. Provisions of the Gonzalez Act, courts have found, contemplate that certain actions against military physicians based upon non-federal law are not barred. But this is at most "a legal disposition implied by a statutory text" (484 U.S. at 453). The Reform Act, by providing federal employees with an independent source of im-

[7] The Court explained that the Court of Claims had reviewed discharges by virtue of its having been deemed an "appropriate authority under applicable law" to consider employees' claims of unlawful termination. But after the enactment of the CSRA's "comprehensive and integrated review scheme," the Court of Claims was no longer such an authority. The only appropriate authorities to consider employees' claims were those, if any, designated by the CSRA. Thus, the effect of the CSRA was to withdraw from the Court of Claims the power to consider certain issues. That consequence was held not to trigger the presumption against implied repeals. 484 U.S. at 454.

munity, does not abrogate the Gonzalez Act. It merely reduces the availability of actions against military physicians under non-federal law. The presumption against implied repeals is no more applicable in this case than it was in *Fausto*.

Moreover, the Gonzalez Act remains "an operative part of the integrated statutory scheme" (484 U.S. at 453) by which federal employees are protected from suit. The fact that Congress chose not to repeal the Gonzalez Act and other similar statutes provides no support for respondents' implied-repeal argument. See Resp. Br. 27-28. The Gonzalez Act will continue in two respects to play a role in protecting military medical personnel who are also encompassed by the Reform Act. First, the Gonzalez Act will authorize indemnity in those cases, such as suits initiated in foreign courts, in which the Reform Act might not be enforceable. See *Powers* v. *Schultz*, 821 F.2d at 297. Second, the provision of the Gonzalez Act waiving sovereign immunity as to medical malpractice claims sounding in intentional tort, 10 U.S.C. 1089(e), will enable plaintiffs to pursue those claims against the United States. The fact that Congress did not expressly repeal the Gonzalez Act does not provide any basis for an inference that Congress meant to exempt military medical personnel from the Reform Act.

For similar reasons, there is no inconsistency between our position and the enactment, in the same year as the Reform Act, of a waiver of sovereign immunity for malpractice claims sounding in intentional tort against medical personnel of the Veterans Administration, 38 U.S.C. 4116(f). See Resp. Br. 40-41. Had that amendment not been passed, the effect of applying the Reform Act to VA physicians would have been to bar such "intentional" malpractice claims altogether. By virtue of its enactment, plaintiffs may now pursue those claims against the United States. (Significantly, the Federal Drivers Act, the statute that Congress did expressly supersede, did not contain any comparable provision that could be given effect consistent with the Reform Act.)

As respondents suggest (Resp. Br. 38), Congress was aware of the existence of the Gonzalez Act and other similar statutes when it drafted the Reform Act. Nevertheless, none of the actions Congress took (and failed to take) is inconsistent with enforcement of the plain meaning of the Reform Act. Indeed, in view of the continued need for the provisions of the Gonzalez Act even after the enactment of the Reform Act, leaving that statute on the books was an entirely sensible drafting decision.

Respondents' position is far less plausible. It contemplates that Congress, acting with the Gonzalez Act and other narrow immunity statutes plainly in mind, intended to exempt federal employees covered by those statutes from the Reform Act, but failed to include an express exception to implement that intention. The fact that Congress did provide express exceptions for other claims heightens the incongruity of that notion.

ii. Even if the circumstances of this case triggered the presumption against implied repeals, the Reform Act would satisfy the requirements of that canon. There is no rule that "all-encompassing statutory language is not to be literally construed" (Resp. Br. 29), nor is the Reform Act a statute that "cannot mean what it says," *National Soc'y of Professional Engineers* v. *United States*, 435 U.S. 679, 687 (1978).[8] Applied in accordance with its terms, the

[8] In *National Soc'y of Professional Engineers*, the Court noted that literal application of the Sherman Act's prohibition

Reform Act operates coherently, both alone and in conjunction with the Gonzalez Act. The Reform Act's text contains abundant evidence that Congress intended the Act to be all-encompassing. The statute employs a defined term that includes all members of the military in extending the Reform Act's protection to "any employee of the Government," 28 U.S.C. 2679(b)(1). See 28 U.S.C. 2671. In 28 U.S.C. 2679(b)(1), the FTCA remedy is made exclusive of "any other civil action or proceeding for money damages" by reason of a tort committed by a federal employee acting within the scope of his employment; the Attorney General is authorized to issue a scope certification in "any civil action or proceeding" commenced in state or federal court on such a claim, 28 U.S.C. 2679(d)(1)-(2); upon the issuance of a scope certification, "any action or proceeding" in which it was issued must proceed in the same manner as any action against the United States subject to the limitations and exceptions applicable to those actions, 28 U.S.C. 2679(d)(4); and the Act applies "to all claims, civil actions, and proceedings pending on, or filed on or after," its date of enactment, Section 8(b), 102 Stat. 4565-4566, Pet. App. 25a. Congress's intention to legislate as comprehensively as this language suggests is confirmed by the staute's findings and statement of purpose, its legislative history addressed to the precise point at issue, and its two narrowly tailored exceptions.

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of "every" contract that restrains trade would "outlaw the entire body of private contract law." 435 U.S. at 687-688. *Briscoe* v. *LaHue*, 460 U.S. 325, 330 (1983), and *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), determined that 42 U.S.C. 1983's reference to "[e]very person" who acts under color of state law could not be interpreted to abrogate well-established common law immunities.

Cases cited by respondents in which this Court declined to find implied repeals did not involve statutory provisions similar to those at issue here. For instance, in *Morton* v. *Mancari*, 417 U.S. 535 (1974), employees of the Bureau of Indian Affairs argued that Congress, in enacting Title VII's prohibition on invidious discrimination, had impliedly repealed a statute obligating the BIA to grant employment preferences to Indians. This Court rejected that claim, noting that Title VII contained an express exception for other Indian preferences and that Congress had manifested a longstanding commitment to Indian preferences (a commitment reaffirmed in statutes passed after Title VII). *Id.* at 547-551.[9] The Reform Act does not include any exception supporting respondents' position and literal application of that Act would not contradict any established congressional program.

In *Wood* v. *United States*, 41 U.S. (16 Pet.) 342 (1842), the Court rejected a claim that a statute providing for a forfeiture of imported goods if an inspection revealed that they had been undervalued for

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[9] In *Morton*, it appeared that the Bureau of Indian Affairs would have violated Title VII, standing alone, if it afforded Indians the employment preference that a previously enacted statute *required*. Thus, there was no means of reconciling the two statutes without considering whether Title VII had impliedly repealed the Indian preference.

Similarly, in *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164 (1976), the Court refused to find an implied repeal of a statutory *bar* to suit against the United States in certain circumstances on the basis of a later authorizing statute. As in *Morton*, the two statutes could not be reconciled without resolving the issue of implied repeal. And a careful examination of the history and purpose of the later statute disclosed a legislative objective far narrower than would be needed to support a holding of implied repeal.

tariff purposes impliedly repealed a statute providing for a forfeiture of goods imported under false invoices. In *Wood*, the second statute only specified one situation in which a forfeiture would occur. It did not purport to exclude other bases for a forfeiture; indeed, as this Court noted, there was not "the slightest repugnancy between" the two statutes. *Id.* at 364. Here, by contrast, the Reform Act expressly applies to "any employee of the Government," and respondents' conception of the Gonzalez Act would require a result directly at odds with several provisions of the Reform Act. Even if respondents were correct in suggesting that the Gonzalez Act "authorizes" the pursuit of an action against military medical personnel, the presumption against implied repeal—as it has been applied in this Court's cases—would not justify denying effect to the Reform Act.

Congress's decision to confer immunity on individual employees in cases in which an action against the United States is barred may operate to leave an injured person without the right to sue in tort (although, in cases like this, an administrative remedy is potentially available).[10] But when it enacted the Reform Act, Congress made a deliberate choice with full awareness of the consequences. The House committee report on the Act explained (H.R. Rep. No. 700, *supra*, at 6):

> The "exclusive remedy" provision of section 5 is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment. Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery. Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee [or] his or her estate.
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For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded with instructions to substitute the United States as the sole defendant and to dismiss the action.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

OCTOBER 1990

[10] See Armed Forces (Military Claims) Act, 10 U.S.C. 2733 *et seq.* We are advised that respondents filed a claim under this statute, but that there is a substantial question as to whether they complied with the relevant two-year statute of limitations.

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